

No. 11139

2420

United States
Circuit Court of Appeals
For the Ninth Circuit.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey Corporation,
Appellant,

vs.

LESLIE O. FOWLES,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington,
Southern Division

FILED

OCT 25 1945

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of William J. Madden on Motion to Quash Service of Summons	9
Amended Complaint	10
A—Policy of Insurance	17
Answer	48
Appeal:	
Bond on	174
Certificate of Clerk to Transcript of Rec- ord on	179
Designation of Record on	176
Designation (Amended) of Record on....	178
Notice of	174
Order Extending Time to Prepare and Transmit Record on	178
Statement of Points on	181
Designation of Record on (CCA).....	183
Bond on Appeal, Cost and Supersedeas.....	174
Certificate of Clerk to Transcript of Record on Appeal	179

Index	Page
Complaint	2
Complaint, Amended	10
Designation of Record:	
Appellant's (DC)	176
Appellant's Amended (DC)	178
Appellant's (CCA)	183
Exhibit:	
2—Envelope containing numerous documents showing Premium Rates	129
Findings of Fact and Conclusions of Law....	159
Proposed by Defendant	150
Judgment	169
Proposed by Defendant	157
Motion for New Trial	171
Motion to Quash Amended Complaint and Service thereof	37
Affidavit of Wm. J. Madden	38
Motion to Quash Summons and Service thereof	8
Names and Addresses of Attorneys	1
Notice of Appeal	174
Opinion of the Court	39
Order Denying Motion for New Trial	173

Index	Page
Order Extending Time to Prepare and Transmit Record on Appeal	178
Order Overruling Demurrer and Denying Motion to Quash	47
Reply	55
Statement of Points on Appeal (CCA).....	181
Transcript of Testimony	59
Exhibit for Defendant:	
2 — Envelope containing documents showing Premium Rates	129
Exhibit for Plaintiff:	
A—Insurance Policy in Suit	61
Set out at page	17
Oral Decision of the Court.....	122
Witnesses for Defendant:	
Fisk, Keith	
—direct	115
Witnesses for Plaintiff:	
Bader, Newton C. (Deposition)	
—direct	77
—cross	93
—redirect	94, 96
—recross	96
Fowles, June	
—direct	97

	Index	Page
Witnesses for Plaintiff—(Contd.)		
Fowles, Leslie O.		
—direct	63
—cross	71
—redirect	74
Kuechelhan, Lee I.		
—direct	100
—cross	106
—redirect	114

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In the United States District Court in and for the
Eastern District of Washington Southern Division

Civil No. 191

LESLIE O. FOWLES,

Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey corporation,
Defendant.

COMPLAINT

To the Honorable Lewis B. Schwellenbach, Judge
of Said Court:

1. This action is brought under the provisions of the Federal Declaratory Judgment Act as amended. (Sec. 274d of the Judicial Code; 28 USCA Sec. 400)

2. Plaintiff is a citizen and resident of the State of Washington.

3. The defendant is a corporation, organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of, among other things, engaging in a general life, health and accident insurance business, and is duly admitted and licensed to transact such business in the State of Washington.

4. There is a diversity of citizenship between the plaintiff and the defendant. That amount in

controversy herein exceeds the sum of \$3,000.00, exclusive of interest and costs.

5. On or about the 4th day of May, 1937, the defendant issued to plaintiff, then 32 years of age, at the City of Olympia, Washington, in consideration of the premium of \$10.20 and the statements contained in the application of plaintiff therefor, its policy of life, health and accident insurance No. 14 H 5110, and said policy of insurance, by virtue of renewals thereof, remained [1*] in full force and effect at all times hereinafter mentioned.

6. Said policy of insurance provided, subject to the provisions and limitations therein contained, that defendant insured plaintiff against loss of time and the expenses of hospital, nursing, medical and surgical care, resulting independently of all other causes, from accidental bodily injury, fatal or non-fatal, referred to therein as "such injury", from the date of any accident causing continuous total disability which should prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for such loss of time for the period of such disability.

7. Said policy of insurance provided further that if such injury entitled plaintiff to such weekly indemnity under the terms thereof, and within ninety days from the commencement of such disability, defendant would pay for treatment and residence in a hospital, in addition to the indemnity otherwise provided, for a period not exceeding

*Page numbering appearing at foot of page of original certified Transcript of Record.

fifteen consecutive weeks, provided plaintiff should be necessarily confined in a hospital, the amount expended for such hospital expenses to the extent of \$25.00 weekly.

8. At the time of making application for said policy of insurance, plaintiff's occupation was that of a Mail Carrier in the Postal Service of the United States in the City of Olympia, State of Washington, and that fact was so stated and known to the defendant. On or about 1937, plaintiff became a Commissioner Officer in the Military Service of the United States of America. In that connection, said policy of insurance provides:

Change of Occupation. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the [2] premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

9. On or about the 14th day of April, 1943, at or about the hour of 7:10 o'clock A. M., plaintiff, while on furlough and while operating a motor vehicle for recreation in the City of Philadelphia, Commonwealth of Pennsylvania, was involved in an accidental collision between said motor vehicle and a trolley car of the Philadelphia Transportation Company, a corporation of the Commonwealth of Pennsylvania.

10. As a result of said accidental collision, plaintiff suffered compound fractures of his skull, with severe cerebral concussion, and hemorrhage into his middle ear and disturbance in the internal ear; left acromioclavicular separation; severe, multiple contusions and abrasions of his head, body, arms and legs; severe shock to his nerves and his entire nervous system; and he was otherwise injured internally, the extent of which he is now unable to state. Said injuries were and are permanent and plaintiff has been unable at all times since the date thereof to engage in either his occupation of Mail Carrier in the United States Postal Service or his duties as a Commissioned Officer of the United States Army. Plaintiff has been advised, believes, and therefore alleges that said injuries will continuously and permanently prevent him from engaging in his former occupation of Mail Carrier in the United States Postal Service, or in any other occupation requiring physical exertion on his part, and such disability has been continuous since said 14th day of April, 1943. As a result of said accident and the injuries resulting therefrom, plaintiff

was immediately thereafter, for a period of fifteen consecutive weeks, necessarily confined in hospitals.

11. An actual controversy exists between the plaintiff and the defendant. It is the position of the defendant that said policy of insurance became limited and the indemnities thereof reduced by reason of the fact that plaintiff changed his occupation from that of the Postal Service as Mail Carrier, to that of a Commissioned Officer of the United States Army, and that the latter occupation, being more hazardous, the premiums paid for said [3] policy of insurance do not purchase for plaintiff an indemnity of \$25.00 per week, but an indemnity of \$5.00 per week up to a principal sum of \$500.00 only, plus any sums plaintiff was obliged to expend in communicating with relatives, but not in excess of \$100.00.

12. It is the position of plaintiff that said policy of insurance provides an indemnity of \$25.00 per week in his favor for the period of his disability, and during the term of his natural life. It is the further position of plaintiff that said change in his occupation had no casual connection with or relation to said accident which resulted in his injuries and disability, for the reason that said accident did not occur while plaintiff was engaged in any occupation, but while he was operating a private and personally owned motor vehicle, for recreation, an act common to the lives of men without regard to occupation, over and upon the streets of the City of Philadelphia, in the Commonwealth of Pennsylvania.

13. Plaintiff duly notified defendant of said accident, of the fact that he was disabled and confined to a hospital and under medical and surgical care. The defendant has denied the claim of plaintiff and declined to pay him the indemnities provided in said policy of insurance. Plaintiff has done and performed all things by him to be done and performed under the provisions of said policy of insurance, and the defendant refuses to carry out and perform its obligations thereunder and pay the indemnities provided in said policy.

14. Said accident of April 14, 1943, which resulted in the injuries to plaintiff hereinabove described, was not occasioned by, was not the result of, or in anywise connected with the change of plaintiff's occupation from that of a Mail Carrier in the United States Postal Service to a more hazardous occupation, but said accident resulted from the driving and operation of a private and personally owned motor vehicle, for recreation, when it came into collision with and was struck by a trolley or [4] street car in the City of Philadelphia, Pennsylvania.

Wherefore, Plaintiff prays:

(a) That the Honorable Court declare that said policy of insurance was not and is not now limited, changed or the indemnities thereunder reduced by reason of the fact that plaintiff changed his occupation from that of a Mail Carrier in the Postal Service of the United States to that of a Commissioned Officer in the Military Service of the United

States, for the reason that said accident and all injuries, disability, hospital, medical, surgical and nursing expenses resulting therefrom, had no casual connection with or relation to such change in occupation, but arose out of and resulted from the operation of a motor vehicle, an act common to the lives of men without regard to occupational classification;

(b) That plaintiff have and recover judgment against the defendant for the sum of \$1,725.00, that being \$25.00 per week from the date of said accident to and including the 9th day of August, 1944, and the sum of \$375.00 to cover the period of fifteen consecutive weeks of hospitalization, and that judgment be entered herein in the total sum of \$2,100.00, and the costs of this action; and

(c) For such other and further relief as to this Honorable Court may seem just, meet and proper.

RAYMOND G. BROWN

Attorney for Plaintiff

[Endorsed]: Filed Oct. 11, 1944. [5]

[Title of Court and Cause.]

MOTION TO QUASH SUMMONS AND
SERVICE THEREOF

The defendant, Commercial Casualty Insurance Company, hereby appears specially only in the above entitled action and moves the court for an

order quashing the summons herein, on the following grounds, to-wit:

1. That the above entitled court does not have jurisdiction of the above captioned matter for the reason that the amount of the controversy as shown by the plaintiff's complaint, is less than the sum of Three Thousand Dollars (\$3,000.00). That the United States judicial code requires that the amount in controversy exceed \$3,000.00 in order to give the United States District Court jurisdiction of the action.

This motion is based upon the affidavit of William J. Madden, hereto attached.

RYAN, ASKREN & MATHEWSON
Attorneys for Defendant

[Title of Court and Cause.]

AFFIDAVIT OF WILLIAM J. MADDEN ON
MOTION TO QUASH SERVICE OF SUM-
MONS

State of Washington
County of King—ss.

William J. Madden, being first duly sworn on oath, deposes and says: That he is one of the attorneys representing the defendant in its special appearance and he makes this affidavit on behalf of the said defendant as he is authorized to do. That the amount in controversy in the above cap-

tioned matter is less than Three Thousand Dollars (\$3,000.00) and that the said court does not have jurisdiction in the action.

WILLIAM J. MADDEN

Subscribed and Sworn to Before me this 31 day of October, 1944.

ETHEL M. MERRILL

Notary Public in and for the State of Washington,
residing in Seattle.

A copy of the foregoing motion to quash summons and a copy of the affidavit of William J. Madden received this 1st day of November, 1944.

RAYMOND G. BROWN

Attorney for Plaintiff

[Endorsed]: Filed Dec. 8, 1944. [6]

[Title of Court and Cause.]

AMENDED COMPLAINT

1.

This action is brought under the provisions of the Federal Declaratory Judgment Act, as amended. (Sec. 274d of the Judicial Code; 28 USCA Sec. 400).

2.

Plaintiff is a citizen and resident of the State of Washington.

3.

The defendant is a corporation, organized and existing under and by virtue of the laws of the

State of New Jersey for the purpose of, among other things, engaging in a general life, health and accident insurance business, and is duly admitted and licensed to transact such business in the State of Washington.

4.

There is a diversity of citizenship between the plaintiff and the defendant. The amount in controversy herein exceeds the sum of \$3,000.00, exclusive of interest and costs, as will more fully hereinafter appear.

5.

On or about the 4th day of May, 1937, the defendant issued to plaintiff, then 32 years of age, at the City of Olympia, Washington, in consideration of the semi-annual premium of \$10.20 and the statements made in application of plaintiff therefor, its policy of life, health and accident insurance No. 14 H 5110, a copy of which is attached hereto, marked Exhibit "A", and by reference made a part hereof, and said policy of insurance, by virtue of renewals thereof, remained in full force and effect at all times hereinafter mentioned.

6.

Said policy of insurance provided, among other things, that defendant insured plaintiff against loss of time resulting from accidental bodily injury, from the date of any accident causing continuous total disability which should prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for

such loss of time for the period of such disability; that said policy further provided for an identification indemnity not exceeding one hundred dollars.

7.

Said policy of insurance provided further that if such injury entitled plaintiff to such weekly indemnity under the terms thereof, and within ninety days from the commencement of such disability necessitated treatment and residence in a hospital, defendant would pay for such treatment and residence in a hospital, in addition to the indemnity otherwise provided, for a period not exceeding fifteen consecutive weeks, provided plaintiff should be necessarily confined in a hospital, the amount for hospital expense to the extent of \$25.00 weekly.

8.

That at the time of making application for said policy of insurance, plaintiff's occupation was that of mail carrier in the postal service of the United States in the City of Olympia, Washington; that at said time, plaintiff was, and had been for a number of years, a member of the Washington National Guard, which fact was stated and known to defendant; that the Washington National Guard was mobilized in 1941 and later made a part of the army of the United States.

9.

That said policy of insurance provides in part as follows:

Change of Occupation. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

10.

On or about the 14th day of April, 1943, at or about the hour of 7:10 o'clock A. M., plaintiff, while operating a motor vehicle in Philadelphia, Pennsylvania, solely for recreation and not pertaining to any occupation, nor in the performance of any occupational duties, was involved in an accidental collision between said motor vehicle and a trolley car.

11.

Plaintiff duly notified defendant of said accident, of the fact [8] that he was disabled and con-

fined to a hospital and under medical and surgical care. The defendant has denied the claim of plaintiff and declined to pay him the indemnities provided in said policy of insurance. Plaintiff has done and performed all things by him to be done and performed under the provisions of said policy of insurance, and the defendant refuses to carry out and perform its obligations thereunder and pay the indemnities provided in said policy.

12.

As a result of said accidental collision, plaintiff suffered compound fractures of his skull, with severe cerebral concussion, and hemorrhage into his middle ear and disturbances in the internal ear left acromioclavicular separation; severe, multiple contusions and abrasions of his head, body, arms and legs; severe shock to his nerves and his entire nervous system; and he was otherwise injured internally, the extent of which he is now unable to state; that said injuries have caused plaintiff to be continuously and totally disabled since said April 14, 1943, and has prevented plaintiff from performing any and every duty of his occupation or of any occupation; that plaintiff has been advised, believes and therefore alleges that said injuries will continuously and permanently prevent him from engaging in any duties pertaining to his occupation or any occupation; that as a result of said accident and the injuries resulting therefrom, plaintiff was immediately thereafter, for a period of fifteen consecutive weeks, necessarily confined in hospitals.

13.

That at the time of said accident of April 14, 1943, plaintiff had a life expectancy of 29.62 years and the benefits accrued and to accrue in the future, to plaintiff from defendant, will approximate the sum of \$35,400.

14.

That an actual controversy and dispute exists between the plaintiff and defendant as to the meaning and construction of said policy of insurance, and the plaintiff's present and future rights are effected; the defendant asserts that the plaintiff has changed his occupation to one more [9] hazardous but the plaintiff maintains and claims he is entitled to the full indemnities and benefits set forth in said policy as to total disability, hospitalization and identification indemnity; that his activities at the time of said injury had no causal connection with his occupation nor any occupation; and that at said time he was engaged solely in recreation and was operating a personally owned motor vehicle for his own enjoyment, an act common to the lives of men without regard to occupation.

That said policy of insurance itself is in direct controversy in this proceeding in that either the full indemnities therein provided and enumerated are effective, or, according to defendant, an entirely different set of provisions are controlling, so limiting in scope and value as to almost nullify any benefits.

That the benefits now accrued, amounting to the approximate sum of \$2575, are only a part of plain-

tiff's right of recovery; plaintiff's right to future benefits should be preserved and protected, and the value of that right exceeds \$3000.

Wherefore, plaintiff prays judgment may be entered by this Court declaring that at the time plaintiff was injured, the full indemnity provisions set out and enumerated herein and in said policy of insurance were in full force and effect and that said provisions were not in any way changed, limited nor reduced; that the plaintiff be declared to be totally disabled within the meaning of the terms of said policy; that plaintiff be declared to be entitled to full indemnity for hospitalization and full indemnity as set forth in said policy for total disability for the period said disability prevents him from performing any duty pertaining to his occupation; and granting plaintiff such other relief as may seem meet, just and equitable, together with the costs of this action.

RAYMOND G. BROWN

JUNE FOWLES

Attorneys for Plaintiff [10]

State of Washington

County of Yakima—ss.

Leslie O. Fowles, being first duly sworn, on oath, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing petition and knows the contents thereof, and believes the same to be true.

LESLIE O. FOWLES

Subscribed and sworn to before me this 15 day
of January, 1945.

[Seal] LIONEL PUGMIRE

Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed Jan. 16, 1945.

EXHIBIT "A"

LOYALTY GROUP

This Policy Provides Indemnity for Loss of Life,
Limbs, Sight, Speech, Hearing or Time Due
to Accidental Bodily Injuries to the Extent
Herein Provided.

Policy No. 14H 5110

STAR

ACCIDENT POLICY

Commercial Casualty
Strength Service
Insurance Company
Newark, New Jersey

Issued to Leslie O. Fowles Agent
Newton C. Bader
General Insurance
206 Security Bank Bldg
Olympia Wash
The Man Without a Hat [11]

Exhibit "A"—(Continued)

COPY OF THE APPLICATION FOR THIS
POLICY

1. What is your full name? Leslie O. Fowles
2. What was your age last Birthday? 32 Date of Birth? June 30, 1904 Place Olympia, (State or Country Wash.)
3. Height? 5 ft. 10 in. Weight 157 lbs. Sex? Male Color? White
4. Where do you reside? 135 Foote St. Olympia County of Thurston State of Washington
5. Are you member or firm or employee? United State Postal Service (State name or firm and business engaged in)
Located at? U. S. Federal Bldg. Street, Town of Olympia State of Washington
6. What is your occupation? Postal Service-Mail Carrier (City) (a foot) (State fully duties performed, position and nature of business)
7. To whom shall policy be payable in case of death?
Names Mrs. June C. Fowles, (Relationship) Wife if living, if not to father Mr. Omega B. Fowles, address Olympia, Washington.
8. Do your average weekly earnings exceed the aggregate single weekly indemnity payable under this policy and all other similar policies carried by you? Yes.

Exhibit "A"—(Continued)

9. What accident or health insurance have you in this or other companies or associations? 10.00 per week for accident & sickness in Members Beneficial Ass'n (U S Federal Employees) until \$500.00 is used up.

10. Have you ever received indemnity for any injury or illness? No. What Company? None.

11. Have you ever been declined or postponed for life, accident or health insurance? No What Company? None

12. Have you ever made application for life, accident or health insurance upon which you have not been notified of the action thereon? No

13. Has any life, accident or health policy issued to you been cancelled or has any renewal thereof been refused by this or any other company or association? No

14. Have you in contemplation any special journey or hazardous undertaking? No

15. Do you ever engage in motorcycling or aeronautics? No

16. Have any of your relatives ever been insane or had tuberculosis? Yes. My mother passed away from tuberculosis in 1912 from quick consumption

17. Are your habits temperate? Yes

18. Are you maimed or deformed?—

19. Is your sight or hearing impaired? No [12]

20. Have you ever had a hernia or worn a truss? No

21. Have you ever had any of the following:

Exhibit "A"—(Continued)

Epilepsy? No. Syphilis? No. Vertigo or Dizziness? No

Diabetes: No. Tuberculosis? No. Mental Disorder? No

Disease of Brain or Nervous System? No

Disease of Heart? No

Disease of Tonsils, Nose or Throat? No

Rheumatism? No

22. Have you within the past five years had medical or surgical advice or treatment? Yes. If so state when and what, duration, and name of attending Physician April 5, 1937 cut on index finger of right hand 2 days Dr. H. D. Lillibridge (Duration or Ailment) (Name of Attending Physician)

23. Have you ever had or been advised to have, a surgical operation? No

24. Have you been exposed during the last ten days to any contagious or infectious disease? No

25. Do you agree that the falsity of any answer in this application for a policy shall bar the right to recover thereunder if such answer is made with intent to deceive or materially effect either the acceptance of the risk or the hazard assumed by the Company? Yes

Policy applied for this 4th day of May, 1937.

Signature of Applicant

LESLIE O. FOWLES

Exhibit "A"—(Continued)

Good Faith Strength

This Policy Provides Indemnity for Loss of Life,
Limbs, Sight, Speech, Hearing or Time Due
to Accidental Bodily Injuries to the Extent
Herein Provided.

Commercial Casualty
Strength Service
Insurance Company
Newark, New Jersey

(Hereinafter called the Company)

Single Principal Sum 1000.00

Single Weekly Indemnity 25.00

In Consideration of the premium of Ten and
20/100 Dollars, and of the statements in the appli-
cation for this policy, copy of which is endorsed
hereon and made a part hereof, and subject to
all the provisions and limitations hereinafter con-
tained and endorsed hereon,

Does Hereby Insure Leslie C. Fowles (Herein-
after called the Insured) of Olympia, State of
Washington, whose occupation is 135 Foote Street
for the term of Six (6) months from the 5th day
of May, 1937, beginning and ending at 12 o'clock
noon, Standard Time, at the place of countersig-
nature hereof, against loss resulting directly and
independently of all other causes, [13] from acci-
dental bodily injury, fatal or non-fatal, being here-

Exhibit "A"—(Continued)

inafter referred to as "such injury," as specified in the following schedules, respectively:

Death, Dismemberment, Loss of Sight, Speech or
Hearing.

Schedule 1.

(a) If such injury shall continuously and wholly disable the Insured any time within two weeks from date of accident from performing any and every duty pertaining to his occupation, and during the period of such disability, shall result in one of the losses specified under Specific Losses, the Company will pay the sum set opposite such loss:

(b) Or, if within six months from the date of accident, irrespective of total disability, such injury shall directly result as aforesaid in one of the losses specified under Specific Losses, the Company will pay the sum set opposite such loss, and

In Addition the Weekly Accident Indemnity as provided in Schedule II between the date of accident and date of such loss; provided, further, that not more than one of the amounts (the greater) named under Specific Losses shall be payable for injuries resulting from one accident.

Specific Losses

Loss of Life: The Principal Sum

Both Hands by actual separation at or above wrists: The Principal Sum

Both feet by actual separation at or above ankles:
The Principal Sum

Exhibit "A"—(Continued)

One Hand and One Foot by actual separation at or above wrist and ankle; The Principal Sum

Entire Sight of Both Eyes if irrecoverably lost:
The Principal Sum

Entire Sight of One Eye, if irrecoverably lost, and One Hand at or above the wrist by severance:
The Principal Sum

Entire Sight of One Eye, if irrecoverably lost, and One Foot at or above the ankle by severance:
The Principal Sum

Speech and Hearing, if entire and irrecoverable:
The Principal Sum

One Leg by actual separation at or above knee:
Two-thirds the Principal Sum

One Arm by actual separation at or above elbow:
Two-Thirds the Principal Sum

One Hand by actual separation at or above wrist:
One-Half the Principal Sum

One Foot by actual separation at or above ankle:
One-Half the Principal Sum

Speech or Hearing if entire and irrecoverable:
One-Half the Principal Sum [14]

Entire Sight of One Eye is irrecoverably lost:
One-Third the Principal Sum

Permanent Stiff or Rigid Elbow and Knee Joints: One-Sixth the Principal Sum

Thumb and Index Finger of Either Hand by actual separation at or above metacarpo-phalangeal joints: One-sixth the Principal Sum

Permanent Stiff or Rigid Elbow or Knee Joint:
One-Twelfth the Principal Sum

Exhibit "A"—(Continued)

Or, in the event of loss of both hands, or of both feet, or of the sight of both eyes, covered and defined as above, if the Insured shall so elect in writing, the Company will pay in lieu of the specific indemnity enumerated in this schedule, weekly indemnity at the rate prescribed in Schedule II for total disability so long as the Insured shall live.

Indemnity for Total or Partial Disability.

Schedule II.

Total Loss of Time. Or, if such injury shall not result in any of the losses mentioned in Schedule I, but shall within two weeks from the date of the accident cause continuous total disability, and prevent the Insured from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident Indemnity above specified, for the period of such disability.

Partial Loss of Time. Or, if such injury shall, commencing any time within two weeks from the date of accident or immediately following total disability, prevent the Insured from performing one or more material duties pertaining to his occupation, the Company will pay one-half of the above specified weekly Accident Indemnity for the period of such continuous partial disability, but not to exceed a period of fifty-two consecutive weeks. Weekly indemnity will not be payable under the provisions of Schedule I except as therein stated.

Exhibit "A"—(Continued)

Sunstroke, Freezing, Hydrophobia or Asphyxiation.
Schedule III.

(a) Sunstroke, Freezing, Hydrophobia or Asphyxiation, due solely to such injury, shall be covered by this Policy.

Blood Poisoning.

(b) Blood Poisoning resulting directly from such injury shall be covered by this Policy.

Cas A. & H. 5643—25M—11.30—7275

.....
Service Loyalty Group Security [15]

Optional Indemnities

Schedule IV.

Or, if such injury is one set forth in this schedule, and the Insured so elects in writing within twenty days from the date of the accident, he may take, in lieu of all other indemnity, except as provided under Schedule VII, the amount specified for such injury in this schedule, provided that not more than one such indemnity shall be payable as the result of any one accident; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is \$25.00; if such weekly indemnity is greater or less than \$25.00, then the amount to be paid shall be increased or reduced proportionately.

Exhibit "A"—(Continued)

FOR LOSS

Of one or more Entire Fingers	\$150
Of one or more Entire Toes	200

FOR COMPLETE DISLOCATION

Of the Shoulder	\$100
Of the Elbow	100
Of the Wrist	125
Of the Hip	300
Of the Knee	150
Of two or more Bones of Foot (not toes).....	150
Of the Ankle	150
Of two or more Toes	50
Of two or more Fingers	50

FOR COMPLETE FRACTURE

Of the Skull, both Tables	\$325
Of the lower Jaw	80
Of the Collar Bone	160
Of the Pelvis	250
Of the Thigh	300
Of the Leg (Tibia and Fibula).....	200
Of the Leg (one bone).....	100
Of the Knee Cap	200
Of the Arm between Elbow and Shoulder.....	160
Of the Arm between Wrist and Elbow (both bones)	160
Of the Arm between Wrist and Elbow (one bone)....	100
Of two or more Ribs	100
Of the Foot (two or more bones—not toes).....	125
Of the Hand (two or more bones—not fingers).....	125
Of two or more Toes	100
Of two or more Fingers	100
Of the Scapula (Shoulder Blade).....	100

Double Indemnities

Schedule V.

The amounts payable in Schedule I, II and IV shall be doubled if such injury is sustained by the Insured,

Exhibit "A"—(Continued)

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof or while boarding or alighting therefrom) provided by a common carrier for passenger service.

(2) While in a passenger elevator (excluding elevators in mines).

(3) In consequence of the destruction, by fire, of a building while the insured is therein, (excluding firemen on duty).

(4) In consequence of being struck by lightning.

(5) In consequence of the collapse of the walls of a building while the Insured is therein.

(6) In consequence of the explosion of a steam boiler.

(7) In consequence of a cyclone or tornado.

Non-Disabling Injury Indemnity

Schedule VI.

Or, if such injury shall not disable the Insured or entitle him to any other indemnity under this policy, but shall require immediate medical or surgical [16] attention, the Company will reimburse him for the cost of such treatment in an amount not to exceed the single Weekly Accident Indemnity for one week, provided that the attending physician's or surgeon's receipt is filed with the Company within ninety days from the date of loss.

Surgical Operations.

Schedule VII.

If such injury to the Insured shall, within Ninety

Exhibit "A"—(Continued)

days from the date of the accident necessitate a surgical operation named in this schedule, the Company will pay, in addition to any other indemnity herein provided, the sum named for such operation in the Schedule of Surgical Operations; provided that not more than one such operation indemnity shall be payable as the result of any one cause of disability, and such operation indemnity may be subject to the election of the Insured; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is \$25.00; if such weekly indemnity is greater or less than \$25.00 then the amounts to be paid shall be increased or reduced proportionately. Reimbursement will not be made for any operation which is necessitated by a disease or bodily condition contracted or existing prior to the issue of this policy.

AMPUTATION OF—

Foot, Hand or Forearm	\$ 25
Leg, at or above knee	50
Arm, above elbow	50
Thigh, involving hip joint	100
Fingers, one or more entire	10
Toes, one or more entire	10

REDUCTION OF DISLOCATION OF—

Shoulder, Elbow, Hip, Knee or ankle	\$ 25
Wrist or Low Jaw	15
Fingers, one or more	10

EXCISION OF—

Shoulder, Hip or Knee Joint	\$100
Elbow, Wrist or Ankle Joint	50
Eye	50

Exhibit "A"—(Continued)

REDUCTION OF FRACTURE OF—

Lower Jaw, Collar Bone, or Shoulder Blade.....	\$ 25
Breast Bone or Nose	10
Rib or Ribs	10
Rib or Ribs (resection)	50
Upper Arm	25
Forearm, one or both bones.....	25
Wrist or Hand	15
Fingers, one or more	10
Pelvis or Sacrum, any of the bones of.....	50
Coccyx	10
Thigh	75
Knee Cap (open operation)	50
Knee Cap (Fixation)	25
Leg Bone (One)	25
Leg Bone (Both)	50
Foot, two or more bones, not toes	15
Toes, one or more	10

LAPAROTOMY (Opening of the abdominal cavity for an operation on any organ contained therein).....	\$100
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INCISION FOR—

Synovitis (inflammation of the lining membrane of a joint)	\$ 25
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HYDROPHOBIA, Pasteur Treatment	50
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GUNSHOT WOUNDS (not necessitating amputation or Laparotomy)	25
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SKULL TREPHINING for fracture	100
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SUTURING WOUNDS	5
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Hospital Expenses

Schedule VIII.

If such injury to the Insured shall entitle him to weekly Indemnity under the terms of this policy and

Exhibit "A"—(Continued)

within ninety days from the commencement of disability shall necessitate treatment and residence in a hospital, the Company will pay, in addition to [17] the indemnity otherwise provided for a period not exceeding fifteen consecutive weeks, during which time the Insured shall be necessarily confined in the hospital, the amount for hospital expenses but not exceeding per week the amount payable hereunder as single weekly indemnity.

Graduate Nurse Fees

Schedule IX.

If such injury to the insured shall entitle him to weekly indemnity for total disability under the terms of this policy and within ninety days from the date of commencement of said disability, the Insured shall need and receive the care and attendance of a nurse who is a graduate of a licensed hospital, and provided no claim is made for hospital expenses, the Company will pay to the Insured the amount actually and necessarily expended by him to secure such nurse's care and attendance, for a period not exceeding fifteen consecutive weeks but not exceeding per week the amount payable hereunder as single weekly indemnity.

Aerial Passenger Injuries

Schedule X.

The Company will pay indemnity (Single Indemnity only) for any loss specified in the policy result-

Exhibit "A"—(Continued)

ing from injuries caused by any of the hazards of air commerce while the Insured is riding as a fare-paying passenger in a licensed commercial aircraft operated on a published schedule and provided by an incorporated common carrier for passenger service and while operated by a licensed transport pilot and flying on a regular air route between two definitely established airports.

Identification Indemnity

Schedule XI.

If such injury shall render the Insured physically unable to communicate with relatives or friends, the Company will, upon receipt of a telegram or other message giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses, not exceeding One Hundred Dollars (in addition to any other indemnity herein provided), necessary to put the Insured in communication with and in care of relatives or friends.

Standard Provisions:

Change of Occupation. 1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the [18] Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is

Exhibit "A"—(Continued)

doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

If the law of the State in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the State official having supervision of insurance in such State then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's rates and classification of risks last made effective by it in such State prior to the occurrence of the loss for which the Company is liable.

Changes in Policy. 2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

Reinstatement of Policy. 3. If default be made

Exhibit "A"—(Continued)

in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

Time of Notice of Claim. 4. Written notice of injury on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury. In event of accidental death immediate notice thereof must be given to the company. [19]

Sufficiency of Notice. 5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at Newark, N. J., or to any authorized agent of the Company, with particulars sufficient to identify the insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

Forms for Proof of Loss. 6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen day after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the

Exhibit "A"—(Continued)

occurrence, character and extent of the loss for which claim is made.

Time for Filing Proof of Loss. 7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

Medical Examination. 8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

Immediate Payment of Indemnities. 9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

Weekly Indemnity Payable in Installments. 10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each four weeks during the continuance of the period for which the Company [20] is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

To Whom Indemnities Payable. 11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to

Exhibit "A"—(Continued)

the estate of the Insured. All other indemnities of this policy are payable to the Insured.

Cancellation By Insured. 12. If the insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured, and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

Rights of the Beneficiary. 13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

Limitations of Time for Bringing Suit. 14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

The Limitations Controlled By Statute. 15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by law of the State in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Cancellation By Company. 16. The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last

Exhibit "A"—(Continued)

address as shown by the records of the Company, together with cash or the Company's Check for the unearned portion of the premiums actually paid by the Insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

Additional Provisions:

Injuries Not Covered. 21. This policy does not cover any accidental bodily injury caused or contributed to, directly or indirectly, by sickness or disease, or by ptomaines or bacterial infections (except [21] pyogenic infections which shall occur with and through an accidental cut or wound), or by war or any act of war; nor disappearance; nor loss resulting from any means or act which, if used, done or self-inflicted by the insured while in possession of all mental faculties, would be deemed intentional; nor loss suffered while, or resulting from, riding or being in or on any aerial device or conveyance except as provided in Schedule X.

Specific and Permanent Losses. 22. No payment shall be made for more than one loss under Schedule I. Any payment made under Schedule I shall terminate this policy, which must be surrendered.

Copy of Application Part of Contract. 23. The copy of the application endorsed hereon is hereby made a part of this contract. No provision of the charter, constitution or by-laws of the Company not included herein shall avoid the policy or be used in evidence in any legal proceedings hereunder.

Renewal of Policy. 24. This policy may be renewed, subject to all of its provisions, from term to

Exhibit "A"—(Continued)

term with the consent of the Company and by the payment of the premium in advance.

In Witness Whereof, the Commercial Casualty Insurance Company has caused this policy to be signed by its President, and its Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative.

(Signature Not Legible)

President.

WM. R. GRIFFIN,

Secretary.

Dated and Countersigned at Olympia, Washington, the 5th day of May 1937.

By.....

Authorized Representative.

[Endorsed]: Filed Jan. 16, 1945. [22]

[Title of Court and Cause.]

MOTION TO QUASH AMENDED COMPLAINT
AND SERVICE THEREOF

The defendant, Commercial Casualty Insurance Company, hereby appears specially only in the above entitled action, by its attorneys, Ryan, Askren & Mathewson, and without waiving its prior motion to quash he summons and service hereof in this case on the ground that this court has no jurisdiction of the action, moves the court for an order quashing

the amended complaint and the service thereof, on the following grounds, to-wit:

1. That it appears from Paragraph 12 of the said amended complaint and from the prayer therein that the plaintiff is praying for redress for anticipatory breach of a contract and for indemnity for injuries which he has not yet suffered. That it has been consistently held in this court that payments due on an insurance policy by virtue of disability cannot be recovered in advance.

This motion is based upon the affidavit of William J. Madden, hereto attached.

RYAN, ASKREW &
MATHEWSON,

Attorneys for Defendant.

State of Washington,
County of King—ss.

William J. Madden, being first duly sworn on oath, deposes and says: That he is one of the attorneys representing the defendant in its special appearance and he makes this affidavit on behalf of the said defendant as he is authorized to do. That the suit in question is based upon a certain accident policy issued by the defendant wherein the defendant agrees to pay to the insured certain weekly indemnities during such time as the plaintiff is wholly or partially incapacitated by virtue of certain injuries specified in the said policy. That it plainly appears from the said amended complaint that the plaintiff is herein attempting to raise the amount in suit to [23] the jurisdictional requirements of this court by pleading anticipatory damages which have

not yet occurred and by suing in advance for indemnity payments. The Federal court, as well as the state courts, with some uniformity held that a plaintiff in such cases cannot bring an action on such a policy for injuries which have not as yet occurred, and cannot plead a disability which has not yet been incurred.

WILLIAM J. MADDEN

Subscribed and sworn to before me this 6 day of February, 1945.

(Seal) ETHEL M. MERRILL
Notary Public in and for the State of Washington,
residing at Seattle.

Copy of the foregoing motion and affidavit received this 7th day of February, 1945.

JUNE FOWLES,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 13, 1945.

[Title of Court and Cause.]

OPINION OF THE COURT

Schwellenbach, District Judge

This is an action under the Federal Declaratory Judgment Act (28 U.S.C.A. 400) in which plaintiff seeks to require defendant to pay hospital expenses and weekly disability allowances under the provisions of a policy of insurance issued by the defendant to him in 1937. Plaintiff alleges that, while the

policy was in force, he became totally and permanently disabled as a result of an accident occurring on April 14, 1943. He alleges that he has a life expectancy of 29.62 years and that, under the terms of the policy, he will be entitled during his life to receive benefits amounting to \$35,400. He alleges that, up to the date of the filing of his amended complaint, benefits accrued to the extent of \$2,575. He further alleges that the defendant refuses to pay the benefits provided in the policy for the reason that it contends that prior to the accident he had changed his occupation and that, under the provisions of the policy, the liability of the defendant is limited to such portion of indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits fixed by the company for fore hazardous occupation, which plaintiff alleges would be so limited in scope and value as almost to nullify any benefits. He alleges that his rights to future benefits which he seeks to preserve and protect by this action exceed the sum of \$3,000 in value. To the complaint, the defendant has interposed a demurrer and a motion to quash. By these it seeks to raise the jurisdictional questions to whether the amount in controversy exceeds \$3,000. Plaintiff objects to the consideration of this jurisdictional question under the demurrer and motion contending that they do not properly reach the question. (28 U.S.C. A. 723 C-7 (c) and 126). Regardless of the tactical ineptness on defendant's part, the question is here and must be decided. *Kavourgias v. Nicholaou Company Limited*, 9th Cir., decided March 12, 1945.

Defendant insists that consideration of this jurisdictional question must be limited exclusively to the allegations of the original [25] complaint. That contention is without merit. Federal Rules of Civil Procedure 15 C (28 U.S.C.A. 723 C, 15 (c)). *Culver v. Bell & Loffland*, 146 F. 2d 29, 31; *Alderman v. Elgin J. & E. Ry. Co.*, 125 F. 2d 971, 973; *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F. 2d 561, 562; *Carr v. Fife*, 156 U. S. 494. While it is true that, in determining jurisdiction, the decision must be based upon the facts that existed at the time of the commencement of the original action and it is true that a plaintiff cannot commence an entirely different action by an amended complaint, a plaintiff does have a right to insert new allegations of facts which existed at the time of the filing of the original complaint and they will relate back to the original filing. The only important factual amendment in the amended complaint here, as compared with the original, is the inclusion of the paragraph referring to plaintiff's life expectancy.

The problem which defendant presents on the question of jurisdiction is an extremely perplexing and vexatious one. There is a sharp conflict of opinion between the Circuit Courts of Appeals which have passed on it. The question posed is whether, in a declaratory judgment action, when the indemnities already accrued are less than \$3,000, the court has jurisdiction when it is alleged that, taking into consideration the insured's life expectancy and accepting the allegations as to permanent and total disa-

bility, the value of the insured's rights will, if he lives out and is totally disabled during a sufficient period of his expectancy, amount to more than \$3000.

It is well settled that, in a straight action to recover disability benefits, the jurisdictional amount must be measured upon the basis of the indemnities already accrued. *Mutual Life Insurance Co. of New York v. Wright*, 276 U. S. 602; *Equitable Life Assur. Society v. Wilson*, 81 F. 2d 657; *Wright v. Mutual Life Ins. Co. of New York*, 19 F. 2d 117. This is true even though the collateral effect of the judgment in such actions may be to establish the right of the insured to recover sums far in excess of the jurisdictional amount. *Elgin v. Marshall*, 106 U. S. 578; *Cromwell v. County of Sac*, 94 U. S. 351. See, also, *Healey v. Ratta*, 292 U. S. 263. The [26] Declaratory Judgment Act does not enlarge the jurisdiction of the Federal Courts nor alter the character of the controversies which are the subject of judicial power under the Constitution. *Southern Pacific Co. v. McAdoo*, 82 F. 8d 121; *West Pub. Co. v. Colgan*, 138 F. 2d 320. But when the validity of the whole policy is in issue and the policy value exceeds the jurisdictional amount, the court has jurisdiction in a declaratory judgment action even though the accrued liability for disability payments is less than \$3,000. *Bell v. Philadelphia Life Ins. Co.* 78 F. 2d 332; *Pacific Mut. Life Ins. Co. of California v. Parker*, 71 F. 2d 872; *Ginsburg v. Pacific Mut. Life Ins. of California*, 69 F. 2d 97. In that aspect, obligations it may be compelled to pay in the future are not merely contingent and enter into the amount in dis-

pute. In determining what they are, the life expectancy of the insured may be considered. *Thompson v. Thompson*, 226 U. S. 551; *Brotherhood of Locomotive Firemen & Enginemen v. Pinkston*, 293 U. S. 96; *New York Life Ins. Co. v. Swift*, 38 F. 2d 175; *Jensen v. New York Life Ins. Co.* 50 F. 2d 512

The Court's jurisdiction in cases in which the basic facts substantially correspond to those alleged here has been sustained in *Ballard v. Mutual Life Ins. Co. of N. Y.*, 5th Cir., 109 F. 2d 388; *Franzen v. E. I DuPont DeNemours & Co.*, 3d Cir., 146 F. 2d 837; *Columbian Nat. Life Ins. Company v. Goldberg*, 6th Cir., 138 F. 2d 192. See, also, *Davis v. American Foundry Equipment Co.*, 7th Cir., 94 F. 2d 441. It has been denied in *Mutual Life Ins. Co. of New York v. Moyle*, 4th Cir., 116 F. 2d 434; *Mutual Life Ins. Co. v. Temple*, 56 F. Supp. 737; *Edelman v. Travelers Ins. Co. of Hartford, Conn.*, 21 F. Supp. 209.

Unfortunately this is not a question of which disposition can be made through the simple mathematical process of comparing the number of decisions. In *Mutual Life Ins. Co. v. Moyle*, *supra*, Judge Parker wrote an opinion which can not be ignored even in the face of the weight of authority. No one can deny the correctness of his statement that litigants "may not be [27] permitted, under the guise of seeking declaratory judgments, to drag into federal courts the litigation of claims over which, because involving less than the jurisdictional amount, it was never intended that the federal courts should have jurisdiction." There is much logic in his statement:

“A declaratory judgment can be had, however, only with respect to a justiciable controversy; and the justiciable controversy here, as we have seen, extends only to the accrued disability benefits, as the conditions entitling insured to such benefits may change at any time.” I can see no logic, however, in distinguishing between cases in which the entire policy is attacked and that in which only the question of the right to the benefits is raised. If the amount of disability benefits is too uncertain in one instance, it should be too uncertain in the other. “The conditions entitling insured to such benefits may change at any time,” regardless of whether the attack is on the whole contract or just a part of it. In thus holding, the Moyle case runs counter to the Supreme Court’s statement in *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 242, which reads as follows: “On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was entitled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability

benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.

“That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial [28] cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice.”

On this phase of the case, I feel myself bound by the recent decision of the Ninth Circuit Court of Appeals in *American General Ins. Co. v. Booze*, 146 F. 2d, 329, 331; That was an action for a declaratory judgment by an insurance company which asked the court to determine whether or not it was required to defend an action which had been commenced against its assured. The amount of liability to which the insurance company might be subjected was undetermined. It might be less or much more than \$3,000. In that case, the entire policy was not attacked. The insurance company admitted that its contract was in full force and effect. It alleged that the individual for whose death claim was made was, at the time of his death, covered by the Workmen's Compensation Act of California and that, therefore, his heirs were not entitled to recover from the plaintiff's assured and, therefore, asked the court so to interpret its contract or to relieve it of the obligation to defend

the action against its assured or to pay a judgment which might be rendered against him. The issue was raised that because there was no certainty that the amount of that judgment would exceed \$3,000, therefore the amount in controversy did not exceed \$3,000. Without discussion, the court disposed of the contention as being without merit.

It is true that the policy in the Booze case obligated the company to pay up to \$10,000. That, however, was only the limit of its obligation. It was just the ceiling above which its contract could not go. That is a distinction which few courts have made but which must be made. It is usually only upon death or the happening of a certain event (such as the loss of an eye or a limb) that the company "contracts" to pay a certain amount. The principal sum named to be paid in the event of the occurrence of other events or the existence of certain conditions is the limit of liability. For example, in the policy involved in this case, there [29] are two equally important provisions for indemnity. The first is the "Single Principal Sum \$1,000." The other is the "Single Weekly Indemnity \$25." This plaintiff's claimed right under the policy is to have paid to him the sum of \$25. per week as long as he lives if he is permanently and totally disabled. That right has been placed in doubt by the Company's claim that he lost it because he changed his occupation. The amount in controversy is the value of that which it is sought to be declared free of doubt. It cannot be claimed with any logic that a difference may exist simply

because of the manner in which that doubt has been raised. There is an actual controversy admitting of relief. The jurisdictional question turns on the value of the right which is controverted. The Ninth Circuit Court of Appeals definitely recognized this principle when, in *Equitable Life Assur. Co. v. Wilson*, *supra*, p. 660, it underlined the Supreme Court's language as follows: "The Supreme Court draws the distinction between the two in the following language: 'This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds \$3,000, the District Court has jurisdiction.' 293 U. S. 96, 99, 100, 55 S. Ct. 1, 2, 79, L. Ed. 219."

Defendants demurrer, which I have considered as a motion to dismiss, must be overruled and its motion to quash denied.

L. B. SCHWELLENBACH

United States District Judge

April 2, 1945

[Endorsed]: Filed April 2, 1945.

[Title of Court and Cause.]

ORDER OVERRULING DEMURRER AND
DENYING MOTION TO QUASH

This matter having regularly come before the Court on March 5, 1945, for hearing of defendant's

demurrer and motion to quash, plaintiff and defendant appearing by counsel, and the Court being fully advised [30] in the premises,

It is hereby Ordered that defendant's demurrer, considered herein as a motion to dismiss, is overruled, and defendant's motion to quash is denied.

Dated this 11 day of April, 1945.

L. B. SCHWELLENBACH

United States District Judge.

[Endorsed]: Filed Apr. 11, 1945. [31]

[Title of Court and Cause.]

ANSWER

Comes now the defendant by its attorneys, Ryan, Askren & Mathewson, and for answer to the amended complaint of the plaintiff, admits, denies and alleges as follows:

I.

Answering Paragraphs I., II., and III. of the plaintiff's complaint the defendant admits the allegations therein contained.

II.

Answering Paragraph IV. of the plaintiff's complaint, the defendant admits that there is a diversity of citizenship but denies that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

III.

Answering Paragraph V. of the plaintiff's complaint, the defendant admits that the policy in question was issued at or about the time and place alleged.

IV.

Answering Paragraph VI. of the plaintiff's complaint, [32] the defendant alleges that the policy in question contains the whole contract entered into between the parties and said policy states the liability, if any, which the defendant undertook in the event of injury to the plaintiff.

V.

Answering Paragraph VII. of the plaintiff's complaint, the defendant admits the allegations therein contained.

VI.

Answering Paragraph VIII. of the plaintiff's complaint, the defendant admits that at the time the plaintiff made application for said policy of insurance, the plaintiff's occupation was that of mail carrier. The defendant alleges that it has no information enabling it to form a belief as to the plaintiff's membership in the Washington State National Guard, and the defendant denies that the plaintiff's membership in the Washington State National Guard was ever called to its attention. In said connection the defendant alleges that the application for the said party contains no reference to membership of the plaintiff in the said Washington State National Guard.

VII.

Answering Paragraph IX. of the plaintiff's complaint, the defendant admits that the quoted provision is contained in the said policy but alleges that provision I. (one) relating to change of occupation is not set forth fully in plaintiff's complaint.

VIII.

Answering Paragraph X. of the plaintiff's complaint, the defendant admits that the plaintiff was injured but denies that the injury took place at a time when the plaintiff was engaged in recreation.

IX.

Answering Paragraph XI. of the plaintiff's complaint, the defendant admits that the plaintiff has notified the defendant of the said accident but denies each and every other allegation in said paragraph contained.

X.

Answering Paragraphs XII. and XIII. of the plaintiff's complaint, the defendant denies the allegations therein contained.

XI.

Answering Paragraph XIV. of the plaintiff's complaint, the defendant admits that there is a dispute as to the amount due the plaintiff at this time under the terms of the policy in question but denies each and every other allegation in said paragraph contained.

For a First, Affirmative and Further Defense the Defendant Alleges as Follows:

I.

That the policy of insurance mentioned in the Plaintiff's complaint was issued by the defendant on or about the 4th day of May, 1937, based upon a written application submitted to the company, which application was made a part of the policy of insurance issued to the plaintiff. That semi-annually from May 5, 1937, the plaintiff paid a renewal premium in the sum of \$10.20 and the defendant issued to the insured a renewal receipt continuing the said policy in force for a term of six months from the previous expiration date. The last renewal premium received by the defendant continued the said policy until the 5th day of May, 1943. At no time did the insured or anyone on his behalf ever pay or tender to the defendant or to its account any sum whatsoever other than said semi-annual premium of \$10.20 hereinbefore alleged. [34]

II.

The occupation of the plaintiff was listed in both the said application for insurance and the said policy of insurance as "postal service—mail carrier (city) (on foot)". Some time prior to the time of April 1943, the plaintiff changed his occupation from that of postal service mail carrier to that of an officer in the United States Army on active duty. At all times from prior to the month of April 1943, the said last named occupation was and is classified by the defendant as more hazardous than the occupation of mail carrier in the postal service and was classified by the defendant for

rating purposes as "Class K", and the annual premium rate applicable thereto would have been far in excess of \$10.20 semi-annually, had the defendant company accepted such a risk, that at no time did the plaintiff or anyone in his behalf notify the defendant of the said plaintiff's change of occupation.

III.

That on or about September 15, 1932, the manual of the defendant, containing the classification of risks of various occupations for insurance purposes was filed with the Insurance Commissioner of the State of Washington, and at all times thereafter was and is on file with said Insurance Commissioner. Said manual of risks provides in part as follows, to wit:

"Occupation, Exposure or Hazard

Postal Service—Mail Carrier (city) (on foot) Class "B"

"Commissioned officers and enlisted men Army or Navy, on active military or naval service anywhere in the world during war, insurrection, invasion or punitive expeditions. The term enlisted men includes all men below the rank of Commissioned officers (not insurable) Class "K"

That the plaintiff has filed with the Insurance Commissioner of the State of Washington, a copy of the form of [35] said insurance policy issued to the insured, and at all times thereafter said copy of said form was and is on file with said

insurance commissioner and was and is in full force and effect for use within said State.

That said manual of risks hereinabove referred to provides that an insured in the "B" classification may be insured in the principal sum up to \$10,000.00 and for a weekly indemnity not to exceed \$50.00. That an insured in Class "K" may be insured up to a principal sum of \$500.00 and for a weekly indemnity not to exceed \$5.00. That the said manual provides that in the event of a change of an insured's occupation to one more hazardous than the occupation the insured was originally written in, then in pro rating any claim, the limits referred to above will be strictly adhered to.

IV.

That on or about the 14th day of April, 1943, the plaintiff was involved in an accident and as a result of the injury sustained was confined to the Hahnemann Hospital for a period of five (5) weeks and that he was thereafter transferred to an army hospital where treatment was made without any charge to him.

V.

The defendant asserts and contends that because of the change of occupation, aforesaid, it is obliged to pay to the plaintiff on account of the accident hereinbefore described a sum not in excess of (\$5.00) Five Dollars per week for the period during which the plaintiff was confined to Hahnemann Hospital plus the sum not in excess of Five Dollars

(\$5.00) per week during the period which the plaintiff was permanently disabled from the injury up to the limit specified in the policy, plus [36] any sum which the plaintiff was obliged to expend in communicating with his friends and family, if such expense shall not exceed One Hundred Dollars (\$100.00) as set forth in Schedule XI. of the policy herein referred to.

VI.

That the defendant has at all times been ready and willing to pay to the plaintiff the amount which is due him under the terms of the policy in question and that said plaintiff has refused to accept the said amounts which have been tendered to him by the defendant company.

Wherefore, having fully answered the complaint of the plaintiff, the defendant prays that judgment may be entered setting forth the rights of the plaintiff against the defendant as governed by the contract of insurance as amended by the plaintiff's change of occupation and that the defendant be awarded its costs and disbursements herein expended.

RYAN, ASKREN & MATHEWSON
Attorneys for Defendant [37]

State of Washington
County of King—ss.

William J. Madden, being first duly sworn on oath, deposes and says:

That he is an attorney at law, associated with the firm of Ryan, Askren & Mathewson, attorneys

of record for the defendant herein, that he has read the foregoing answer, knows the contents thereof and believes the same to be true, that he makes this verification on behalf of the defendant corporation as he is authorized to do.

WILLIAM J. MADDEN

Subscribed and Sworn to Before Me This 26 Day of April, 1945.

[Seal]

ETHEL M. MERRILL

Notary Public in and for the State of Washington,
residing at Seattle.

Copy received April 27, 1945

JUNE FOWLES

Atty. for Plaintiff

[Endorsed]: Filed May 3, 1945. [38]

[Title of Court and Cause.]

REPLY

Comes now the plaintiff and replying to the answer of defendant to plaintiff's amended complaint admits, denies and alleges:

Replying to paragraph IV, denies each and every allegation therein contained.

Replying to the first, affirmative and further answer and defense:

I.

Referring to paragraph I of said first affirmative defense, plaintiff admits that the policy of in-

insurance mentioned in plaintiff's complaint was issued by the defendant on or about the 4th day of May, 1937, and that semiannually from said date the plaintiff paid a renewal premium in the sum of \$10.20 and the defendant issued to the insured a renewal receipt continuing the said policy in force for a term of six months from the previous expiration date. The last renewal premium received by the defendant continued the said policy until the 5th day of May, 1943; and said plaintiff denies each and every other allegation therein contained.

II.

Referring to paragraph II of said first affirmative defense, plaintiff admits that the occupation of the plaintiff was listed in both the said application for insurance and the said policy of insurance as "postal service—mail carrier (city) (on foot)," and plaintiff alleges that as a member of the Washington State National Guard he was mobilized with said guard on or about February 3, 1941; and plaintiff denies each and every other allegation in said paragraph contained.

III.

Referring to paragraph 3, of said first affirmative defense, plaintiff denies any knowledge or information sufficient to form a belief as to any of the allegations contained in said paragraph.

IV.

Referring to paragraph 4 of said first affirmative defense, plaintiff admits that on or about the

14th day of April, 1943, he [39] was injured in an accident and confined in Hahnemann Hospital and thereafter removed to an army hospital; and plaintiff denies each and every other allegation in said paragraph contained.

V.

Referring to paragraph V of said first affirmative defense, plaintiff denies each and every allegation therein contained.

VI.

Referring to paragraph VI of said first affirmative defense, plaintiff denies each and every allegation therein contained.

Wherefore, plaintiff prays judgment against the defendant as asked in the amended complaint.

JUNE FOWLES

C. W. HALVERSON

Attorneys for Plaintiff.

State of Washington,
County of Yakima—ss.

Leslie O. Fowles, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing reply; knows the contents therefor; and believes the same to be true.

LESLIE O. FOWLES.

Subscribed and sworn to before me this 3rd day of May, 1945.

(Seal)

LIONEL PUGMIRE

Notary Public in and for the State of Washington,
residing at Yakima.

Copy received May 3, 1945.

RYAN, ASKREN &
MATHEWSON,

W. W. ASKREN,
Attorneys for Defendant.

[Endorsed]: Filed May 7, 1945. [40]

In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.

No. 191

LESLIE O. FOWLES,

Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a Corporation,

Defendant.

COURT REPORTER'S TRANSCRIPT OF
TESTIMONY

Be It Remembered that the above entitled and
numbered cause came on for trial before the Hon.
L. B. Schwellenbach, Judge, without a jury, at the
hour of 10:00 a. m., June 15, 1945, at the court room
of said court in the Federal Building at Yakima,
Washington; the plaintiff appearing in person and
by his attorneys C. W. Halverson and June Fowles,
and the defendant appearing by its attorneys Ryan,
Askren & Mathewson (by Mr. Askren and Mr. Mad-
den);

Whereupon the following proceedings were had
and testimony given, to-wit:

The Court: Are the parties ready?

Mr. Halverson: The plaintiff is ready. I think
no doubt your Honor is familiar with the pleadings
in this case.

The Court: I am very familiar with it. You do

not need to make a statement unless there is some stipulation.

Mr. Halverson: We may be able to stipulate as far as the question of total disability is concerned, that it is hereby stipulated by and between the parties, through their respective [43] attorneys, that the plaintiff, Leslie O. Fowles, sustained injuries in an accident, causing continuous total disability from the date of the accident to the present time. The date of the accident is April 14, 1943.

Mr. Askren: We stipulate to that.

Mr. Halverson: There will be no question as to the total disability during this period of time. I think it might also be stipulated—I am not sure whether this is necessary or not—that the jury may be waived in this case, and both parties consent to try the case before Your Honor.

The Court: Yes. You say total disability to date.

Mr. Halverson: To the present time.

The Court: Is there a question as to the permanency of the injury?

Mr. Halverson: The policy does not use the term “permanent disability.” I think we are all agreed that we will not enter into this stipulation limiting the total disability to this particular time. The question was whether or not the Court, of course, could adjudge anything as to the future in regard to this particular disability, but I think without in anyway limiting the term of the existence of this litigation that it has continued and is now in effect,

and how long it will continue remains to be seen in the future.

Mr. Askren: That is right. [44]

Mr. Halverson: I will have the policy marked at this time.

Mr. Askren: No objection.

Mr. Halverson: I offer the policy in evidence, if Your Honor please. There is no objection.

The Court: You say you have no objection to it?

Mr. Askren: No objection.

The Court: It may be admitted.

(Insurance Policy admitted in evidence as plaintiff's exhibit "A".)

[Printer's Note]: Plaintiff's Exhibit "A" set out in full at page 17.

LESLIE O. FOWLES,

plaintiff, called as a witness in his own behalf, first duly sworn, testified as follows:

Mr. Askren: I wonder if before we start on the testimony I might make a short statement.

The Court: Yes.

Mr. Askren: We have raised no question as to the total, continuous disability of the plaintiff up to the present time. Our defense is that the policy provides if there is a change of occupation, the amount he may recover is that covered by the schedule of risks filed with the Insurance Commissioner.

There is also another issue on the question of the plaintiff's expense, as to the hospital expense when

(Testimony of Leslie O. Fowles.)

he was in a government hospital, and had no expense of his own, whether that is recoverable, or whether he can recover only for the hospital expense which he was required to pay, and that is the [45] issue from our standpoint.

Mr. Halverson: With that in mind, I had better make a short statement of our position in respect to that, which will be that as far as this question of the reduction of indemnity is concerned under the policy, on the grounds of alleged changed occupation, it will be our position, first, that there has been no filing of the schedule of risks with the State Insurance Commissioner of the State of Washington, which entitles the company to require the holders of this particular Star accident policy, as it is termed, "14-H"—there has been no classification of risks filed with reference to that policy which would require us to take a lesser return than that established in the policy, and, secondly, that there has been no change of occupation.

With reference to the hospital expense our evidence will show that Mr. Fowles was in the Hahne-mann hospital at Philadelphia; that he was there, as I recall, for practically five weeks, and that he has incurred hospital bills of \$394.60, nurses' bills in the sum of \$360.00, and doctors' bills of \$650.00. I will state to Your Honor that those bills are charged against Mr. Fowles. Whether the Army is going to pay them or not we do not know. They haven't paid them, but they are carried as a liability against him.

(Testimony of Leslie O. Fowles.)

The Court: A private hospital?

Mr. Halverson: Yes. [46]

Direct Examination

By Mr. Halverson:

Q. Your name is Leslie O. Fowles?

A. It is.

Q. You are the plaintiff in this action?

A. I am.

Q. What is your age?

A. Forty-one the coming June 30th.

Q. Did you take out an accident policy in the Commercial Casualty Insurance Company?

A. I did.

Q. I hand you here plaintiff's exhibit "A", and ask you to state whether or not that is the policy you obtained?

A. That is the policy.

Q. How did you come to obtain this policy—were you solicited with reference to this policy?

A. Yes, sir.

Mr. Askren: Just a minute. There is no issue on that. We admit the policy is in full force and effect, and is at the present time, and how he got the policy or who was instrumental in his getting the policy is immaterial.

The Court: I notice in reading the memorandum that they contend that the agent for the company knew he was a member of the National Guard at the time. I do not know whether that is proper to be introduced or not, but if that [47] is the purpose

(Testimony of Leslie O. Fowles.)

for which it is being introduced, it is material. Whether it is competent evidence, I do not know.

Mr. Askren: I think it would be material if we were refusing to pay the policy because he was a member of the National Guard. Then to show he was in the National Guard might have some effect on it, but we have not refused to pay because he was a member of the National Guard. We are offering the amount provided for to a man in the Army or Navy, and the fact the agent may have known it would be immaterial, as long as there is no refusal to pay because of any National Guard service. If this man was in the National Guard and got hurt and we said, "You are relegated to a lesser amount because you were in the National Guard" it would be material, but we haven't refused to pay on that ground at all.

The Court: The objection is overruled.

Mr. Askren: Exception.

The Court: You do not need to take an exception. The statute gives you one.

Q. Will you state the name of the agent through whom this policy was procured?

A. Mr. Newton C. Bader.

Q. Where does he reside?

A. At Olympia, Washington. [48]

Q. And the premiums that you paid on this policy were paid to what party?

A. To Mr. Bader.

Mr. Halverson: It is our position the question of a change of occupation, if any, is a matter of

(Testimony of Leslie O. Fowles.)

defense, and the burden of proof is upon the insurance company, which is asserting a change of occupation. I do not want to go into this matter out of order particularly.

Mr. Askren: It does not make any difference. If you do not prove it by him I will ask him the questions in regard to his change of occupation.

The Court: You get into this court, Mr. Halverson, on the theory they were refusing to pay your policy by reason of a change of occupation. That opens the door, and that being true, I think you will have to go ahead and prove it.

Mr. Halverson: All right.

Q. Mr. Fowles, at the time you took out this policy, this exhibit "A", were you a member of the Washington National Guard?

A. I was.

Q. And what was your occupation at the time—where were you employed at the time this policy was taken out?

A. As a mail carrier in the Olympia post office.

Q. How long did you continue your employment with the post office? [49]

A. Up to the time I was inducted, or approximately eighteen years.

Q. In other words, about what time were you mobilized into the army of the United States?

A. February 3, 1941.

Q. Now at the time you took out this policy were you at that time a member of the Washington National Guard? A. I was.

(Testimony of Leslie O. Fowles.)

Q. And were you or were you not well acquainted with the agent Newton C. Bader?

A. Yes, sir; I had known him quite a number of years.

Q. Had you seen him when you were in the National Guard? A. Yes, sir; quite often.

Q. Was Mr. Bader——

Mr. Askren: Your Honor overruled my objection as to this line of questions, but since there was never any issue on that, I am willing to admit as far as this is concerned that the agent who wrote the policy knew he was a member of the National Guard.

Mr. Halverson: And he knew that at the time the policy was issued?

Mr. Askren: Yes.

Q. What commission did you hold in the Washington National Guard, Mr. Fowles?

A. I was a captain. [50]

Q. Now was the Washington National Guard mobilized into the Army of the United States?

A. It was. It was mobilized into the Army of the United States.

Q. And you say that that date was February 3, 1941?

A. Yes, sir; that is right.

Q. You were a captain at that time?

A. I was a captain.

Q. Did you have any choice in the matter of whether you wished to enter the Army of the United States? A. No, sir.

(Testimony of Leslie O. Fowles.)

Mr. Askren: I think that is immaterial.

The Court: I think it is too, but I will let him answer, as long as we have no jury here.

Q. Now how long after you were mobilized into the Army of the United States did you continue in the service?

A. I was discharged January 3, 1945, for disability.

Q. January 3, 1945, you received your discharge?

A. As a commissioned officer.

Q. For physical disability?

A. Yes, sir.

Q. Where were you residing at the time the accident occurred?

A. My home was at Collingswood, New Jersey.

Q. On the date of the accident, which as I recall was April 14, 1943, were you on duty in the Army?

A. No, sir; I was on furlough. [51]

Q. When did your furlough begin and when did it end?

A. My furlough began on April 11, 1943, and was to run for ten days.

Q. What were you doing on the particular day the accident occurred?

A. At that particular time I was returning to my home in New Jersey at Collingswood.

Q. Where had you been on that particular day?

A. I had taken my wife down to the train at the Philadelphia depot, and was driving back home.

Q. Was there anyone in the car with you at the time?

(Testimony of Leslie O. Fowles.)

A. No one except a small Chow puppy.

Q. You were returning to your home?

A. Yes, sir.

Q. For what purpose?

A. I wanted to rest. I had nothing else in mind but just to take it easy.

Q. How long had it been since you had had a furlough prior to that time?

Mr. Askren: Just a minute, Your Honor. That is immaterial.

The Court: I will sustain the objection.

Q. Now had you received any further commissions after you went into the Army of the United States?

A. Yes, sir; I had received two. [52]

Q. What were they?

A. Major and Lieutenant Colonel.

Q. At the time you were mobilized or shortly prior to the time you were mobilized, did you obtain a leave of absence from the post office at Olympia?

A. Yes, sir; I did.

Q. Prior to that time had you made certain payments to the retirement fund as an employee of the post office?

A. Yes, sir; I did. I made payments monthly.

Q. And you say you had worked about eighteen years up to that time?

A. Yes, sir.

Mr. Askren: I object to this also. It makes no difference whether he later intends to return to that occupation or not, and I object to this as being immaterial.

(Testimony of Leslie O. Fowles.)

The Court: I will let him answer. That is what the argument will be about.

Mr. Askren: That is the only reason I wanted to make the objection, so you would not think I was letting it go in without objection.

The Court: I will overrule the objection on the theory that will be argued later.

Q. During that time had you made any payments to a retirement fund?

A. Yes, sir; I had. [53]

Q. How long had you made those payments to the post office?

A. I made them every month during the time I worked there. They were taken out automatically.

Q. During the time you were mobilized into the Army did you withdraw any of those payments?

A. No, sir; I did not.

Q. Now, Mr. Fowles, at the time you went into the Army on February 3, 1941, did you expect to follow the Army as an occupation?

A. No, sir.

Q. Was it your intention at that time to return to your previous employment?

A. Yes, sir. It was.

Q. And was that your intention when you received your discharge for physical disability from the Army? A. Yes, sir.

Q. Have you been able to do any work?

A. No, sir.

Q. From the time of the accident down to the present date?

(Testimony of Leslie O. Fowles.)

A. That is right; I have not.

Mr. Halverson: There is no question being raised but what this accident happened on the date alleged?

Mr. Askren: No.

Q. Now approximately since the date of this accident how much time have you spent in the hospital? [54]

A. Well, I would say around eighteen months.

Q. Did you incur certain hospital expense at the Hahnemann Hospital at Philadelphia?

Y. Yes, sir; I did.

Q. Do you recall the amount of your hospital bill there?

A. No, sir; I do not recall except what you read this morning that it was approximately \$400.00. I knew that, and that one doctor was \$250.00 and another \$150.00, and a couple of other amounts.

Q. You had a number of specialists and doctors?

A. Yes, sir. Specialists.

Q. And you also had nurses there?

A. Yes, sir; \$355.00 or \$360.00, I believe.

Q. Have those items been paid to your knowledge?

A. To my knowledge they have not been paid.

Q. And the charge was made against you by the Hahnemann Hospital?

A. Yes; it was charged against me.

Q. Now have you received any payment of any kind from the defendant in this case under this policy in question?

A. I have received no payments.

(Testimony of Leslie O. Fowles.)

Mr. Askren: There is no issue on that, Your Honor.

Mr. Halverson: You may examine.

Cross Examination

By Mr. Askren: [55]

Q. Mr. Fowles, as I understand it, you were employed by the post office at the time you took out your application for insurance.

A. Yes, sir.

Q. And your occupation at that time was clearly stated in the policy as a mail carrier on foot?

A. Yes, sir.

Q. And that was your occupation at that time?

A. Yes, sir.

Q. On February 3, 1941, you were mobilized into the Army of the United States?

A. Yes, sir.

Q. Did you leave Olympia then?

A. I went to Fort Lewis.

Q. From Fort Lewis where did you go?

A. We traveled around the countryside and ended up at Camp California.

Q. From the third of February when you went into the Army of the United States until the present time you have never done any work at any time as a mail carrier?

A. No, sir.

Q. You say you took a leave of absence and intended to come back at the time the war was over?

A. Yes, sir.

(Testimony of Leslie O. Fowles.)

Q. When you were on furlough you were free to do whatever you [56] might want to do, to rest and recuperate. When was your furlough up? The day after the accident your furlough expired?

A. That is termed "leave", and that was up——

The Court: That is a very important distinction. An officer gets a leave and the enlisted men get furloughs.

A. That is right, Your Honor. I am glad you know that much about the Army.

Q. At the time the accident occurred how much longer did your leave give you?

A. It occurred on the 14th, and my leave would have been up on the 21st, and I would have had seven days.

Q. And on the 21st you were going back to your duties in the Army? A. Yes, sir.

Q. And you expected to stay at those duties in the Army, barring an accident that might cause you to be disabled probably until the war was over or until some new situation might arise so it would be proper for you to suggest leaving the Army?

A. I expected to stay there as long as the Government kept me.

Q. You were at the Hahnemann Hospital how long?

A. Approximately five weeks.

Q. Approximately five weeks at the Hahnemann Hospital? A. Yes, sir. [57]

Q. After you were at the Hahnemann Hospital you were then taken to a government hospital?

(Testimony of Leslie O. Fowles.)

A. Yes, sir.

Q. And in that hospital you did not have any hospital expense? A. Yes, sir; I did.

Q. What were the hospital expenses in the government hospital?

A. Any laundry that I might have, plus my food—subsistence, in other words.

Q. Did you not as a government officer have an allowance for subsistence for food?

A. We had to pay for it.

The Court: You had an allowance?

A. Yes, sir.

Q. (Mr. Askren): You received an allowance, but you had to pay for it?

A. We received an allowance always.

Q. Did you not have an allowance while you were in the hospital? A. Yes, sir.

Q. Did the Government pay you while you were at Collingswood, did you not get your pay during that time? A. Yes, sir.

Q. Did you not get your subsistence?

A. Yes, sir.

Q. And you did not have any more laundry during that time than [58] you would have when you were on duty?

A. About the same.

Q. Now did you have any nurses at the government hospital you paid for? A. No, sir.

Q. The only nurses that you had that you say were charged up to you was during the five weeks you were at the Hahnemann Hospital?

(Testimony of Leslie O. Fowles.)

A. Yes, sir.

Q. After you were injured and after you were discharged from the Army of the United States you received an allowance because of your discharge for——

Mr. Halverson: We object to that.

Mr. Askren: Let me finish asking the question.

The Court: Let him finish the question.

Q. When you were discharged from the Army because of being unfit for further service because of this accident you had received, did you receive from the Government a monthly pay, or at least some compensation for the injury you received as a United States Army officer?

Mr. Halverson: I object as being immaterial and irrelevant.

The Court: The objection is sustained.

Mr. Askren: The only purpose of the question was to show that the man was receiving pay after having had the [59] injury in the service of the United States, and therefore he could not have been a mail carrier and function as a United States Army officer at the same time. That is all.

Redirect Examination

By Mr. Halverson:

Q. Judge Askren has asked you if you expected to return to your military duties after the expiration of your leave. You had no choice in the matter, did you?

A. I had no choice. I automatically returned.

(Testimony of Leslie O. Fowles.)

Q. You had no choice as to the length of time you would stay in the service up until such time as you received a discharge, did you?

A. No, sir; no choice.

Mr. Halverson: That is all.

(Witness excused.)

Mr. Halverson: I would like to read into the record the deposition of Newton C. Bader.

The Court: Is it necessary? Judge Askren has admitted their agent knew that he was in the National Guard. Is there anything in addition to that?

Mr. Halverson: There is a letter we want to introduce in evidence.

Mr. Askren: Before counsel takes the time to read the deposition to get to the letter, let me suggest there is no question asked of Mr. Bader in the deposition except as [60] to whether or not a letter had been received, which had to do with the clarification of the policy. In other words, something said by a vice-president in regard to the policy long after the policy was written. It is elementary that nobody can change the policy, and the statute of this state requires that the contract of insurance itself governs the rights of the parties, and there is no allegation in the complaint of any kind, shape or description that after the policy was written that by a rider or otherwise anything was done which changed the terms of the policy. This is speaking of a letter which Mrs. Fowles says she does not know whom it was written to, or——

Mr. Halverson: I am not speaking of that letter. I am speaking of the letter from Mr. Bader to Mr. Fowles with reference to this policy, at which time they were notified that Mr. Fowles had entered the Army of the United States, and asking whether he could retain this policy, and in answer to that letter—the letter which I want to offer and which is identified in the deposition—the letter states they think he should keep it. It goes to the question of the construction of the policy and whether or not there were any classifications of risk which they are now contending they applied to this policy. We claim there was no such classification of risk properly filed that applied to this policy, and I think that this letter is competent [61] evidence to show that that was likewise the position of the company, that as long as he was in the Army of the United States and in the territorial limits of the United States he should keep the policy, and payments were made on the policy in the way of premiums which were not questioned and which were received by the company.

The Court: Go ahead, and I will pass on that.

Mr. Halverson: I will read this deposition then. I will ask to have the deposition published.

Mr. Askren: Practically everything in this deposition—I gave notice I would make objection on legal grounds, and that all objections could be made at the time of the trial, but I made objections during the taking of the deposition, and I think it should be read by question and answer so I may object.

The Court: You can sit up here and read the answers and Mr. Askren can read the questions and make the objects as he wants to. The deposition may be published.

Mr. Askren: I will omit the formal parts.

DEPOSITION OF NEWTON C. BADER,

a witness called on behalf of the Plaintiff, June 2, 1945, was then read by counsel, as follows, to-wit:

“Direct Examination

By Mrs. Fowles:

Q. Mr. Bader, will you please state your name and residence?

A. My name is Newton C. Bader, an insurance broker living in the city of Olympia. [62]

Q. Concerning your insurance broking, what companies do you represent?

A. I have the Commercial Casualty Insurance Company, the London and Lancashire Indemnity Company, Equitable Life and several others.

Q. You represent several others, do you?

A. Do you want the names of all of them. Yes, I do.

Q. Well, we will not go into that. What is your relation to the companies?

A. I am an insurance agent, represent them as agent, just like anyone else.

Q. General agent?

A. I don't believe I am called a general agent.

(Deposition of Newton C. Bader.)

I am a regular agent for my various casualty, fire and life companies."

Mr. Askren: The question whether or not he was a general agent or whether he was not I think is wholly unimportant. I presume your honor will want this in to see about the letter, and because of that I am raising no objection.

"Q. Are you the only one that is here for those various companies?

A. No, some of these companies that I represent have other agent in this town. A majority of the companies I represent, I am the only agent for them here.

Q. The Commercial Casualty Company, are you the only agent [63] here for that?

A. I don't know.

Q. Do you know of any other agent?

A. There used to be another agent, but whether there is another agent now, I don't know. The reason I hesitate is that I don't know.

Q. Do you solicit insurance?

A. That is my business. I solicit insurance, that is my business. I have done that and am still doing that.

Q. What further duties do you have, do you settle claims?

A. I settle some claims, yes.

Q. Do you do anything further with the policies, do you assist the claimant in any way.

A. Assist the claimants of the companies just as any other insurance agent would do. I am no

(Deposition of Newton C. Bader.)

different than any other insurance agent. They all do the things that I do.

Q. How long have you represented the Commercial Casualty Company?

A. To the best of my knowledge, about eighteen or twenty years; eighteen years, at least.

Q. What is your territory?

A. Anywhere in the state of Washington.

Q. You don't have any special territory?

A. I couldn't answer that, I don't know. I have a license for the state of Washington which entitles me to write insurance [64] for that company anywhere in the state of Washington.

Q. You have a general agency, then. Are you permitted to appoint sub-agents?

A. No, I have no such authority. In fact, I wouldn't want to.

Q. Do you know the plaintiff in this action, Leslie O. Fowles?

A. I have known Les for many, many years.

Q. About how many years?

A. I would say about twenty-three years.

Q. Did you solicit and take his application for an accident policy in the Commercial Casualty Company? A. I did.

Q. About when was this?

A. About fourteen or fifteen years ago, to the best of my knowledge. I don't recall exactly, because I haven't looked it up, but it is quite a number of years ago.

Q. Did you know the plaintiff very well?

(Deposition of Newton C. Bader.)

A. I knew Les quite well, yes.

Q. Are you an ex-service man?

A. I am.

Q. Are you a member of the Legion?

A. I certainly am. Have been ever since I came to Olympia.

Q. At one time had you held any office in the Legion?

A. Yes. I am Past Commander in the American Legion here.

Q. Did the American Legion have a building that they owned?"

"Mr. Askren: Well, Mrs. Fowles, I will have to reserve objection to that at the time of trial. I would like to suggest that that is so far afield from anything that occurs to me, it [65] is just taking up time."

Mr. Askren: I think so. I should like to raise the objection now.

Mr. Halverson: It is our position on that that this is leading up to his knowledge of the activities of Mr. Fowles when he was in the National Guard.

The Court: Assuming that for the present, I will overrule the objection.

"A. What is the question, again?

Q. Did the American Legion own a building?

A. Yes, we had the building that is now occupied by the Ice Arena.

Q. Was the Ice Arena occupied by an organization, was there an organization that occupied it?

A. The National Guard.

(Deposition of Newton C. Bader.)

Q. Did the American Legion ever meet there, did they have their office there?

A. They had their meetings there, and the National Guard met there.

Q. You, then, came in contact with the National Guard? A. Yes.

Q. Did you see the plaintiff down there attending National Guard meetings?

A. I certainly did.

Mr. Askren: I object to all of this as immaterial and irrelevant, not having any bearing on the issues in the case." [66]

The Court: With your admission your agent knew he was in the National Guard at the time he took the policy, I see no reason for putting any of this in down to line 29.

"Q. What did he give you as his occupation?

A. As a mail carrier for the city of Olympia. Of course, I saw him on the street every day.

Q. That was his occupation, and he was also a member of the National Guard?

A. He was a member of the National Guard, yes.

Q. Did you advise the company to that effect, that he was a member of the National Guard?

A. If I did, I don't recall. To tell you that I did, I don't know—I don't recall.

Q. Do you remember telling Mrs. Fowles that you advised the company, when I saw you about a week or two ago?

A. I think I mentioned something like that, to the best of my knowledge. Just how I mentioned

(Deposition of Newton C. Bader.)

it to the company, that he was a member of the National Guard.

Q. Did you mail the premium notices, the notices of premiums, to the plaintiff Leslie Fowles?"

Mr. Askren: All of this has to do with something that is not an issue in the case. There is no claim the premiums were not paid and no claim it was not received, and I would like to suggest to Your Honor there is not any of this that [67] is material, or is about a letter that was written by somebody. There is no allegation in the complaint or anywhere in the pleadings that the policy has been changed or that it was decreased or increased in the slightest degree, and I think all of this is immaterial.

The Court: You can skip through page 6.

Mr. Halverson: The only thing we desire to establish there, if the Court please, is that this man was actually handling the collection of these premiums for the company. It was not a question of remitting the premiums directly to the company, but they were paid to Mr. Bader, and this goes to the question of agency.

The Court: Is there any dispute about his being the agent?

Mr. Askren: There is no question about that. Whether they were sent to the agent or to the company would not make any difference. Even if the agent wrote anything it would not be material. The agent would not have the right to do it, and if there was a claim he had such a right it would have to be

(Deposition of Newton C. Bader.)

alleged as a ground for recovering something different than the policy provided for.

The Court: Go to line 4 on page 7: "When you wrote this policy, do you remember any of the statements you made at that time as to your relations with the company?"

Mr. Askren: I object to that. [68]

The Court: The statement by an agent to somebody he is an agent, or the nature of his agency, is not admissible. The Question: "Do you remember any statements you made at that time as to your relations with the company?" I think that objection is well taken.

Mr. Halverson: As I understand the rule after there is an agency established then the statements made by the agent go to the question of the scope of his authority. We have some evidence to that particular question.

The Court: He testified to it, but you cannot get testimony of statements that an agent made and create the agency by the statements he made.

Mr. Halverson: I am not attempting to do that, Your Honor. I think this is material only from the standpoint of establishing maybe the scope of the agent's authority, because the company has admitted this agency, and now the question is what authority that particular agent had.

The Court: I will sustain the objection to the two questions on page 7.

Mr. Askren: I believe the next question is on page 8, line 11:

(Deposition of Newton C. Bader.)

“Q. Do you remember stating that you settled all claims for this company and that the plaintiff need not worry about collecting for any accident, that you handled all matters for the company, that they left that to you? [69]

A. I don't recall making such a broad statement as that.

Q. Did you have any difficulty in delivering the policy? Was it accepted as soon as you brought it to the plaintiff?”

Mr. Askren: That is along the same line.

The Court: They admit the policy. I will sustain the objection to that.

Mr. Halverson: The only basis for that was we were trying to lay the ground, or the foundation, for introduction of a rider which we claim was issued. We made a demand upon them to produce it, but I don't know whether they have been able to find that or not.

Mr. Askren: We are now reaching the crux of it. He now suggests that he did have something that would be equivalent to a rider. There was never any allegation there was a rider, and as far as the company was concerned there was no rider, and he cannot come in on a deposition and attempt to bring out something that might have been equivalent to a rider without alleging it.

Mr. Halverson: We will not pursue that. It was a letter, and I think the notice to produce refers to it at a letter.

(Deposition of Newton C. Bader.)

The Court: We will get to that when we get to it. I will sustain the objection to the question, and we will go to page 9, lines 2 and 4.

“Q. Did you have any difficulty in getting the plaintiff to [70] accept the policy as issued?”

The Court: I sustained the objection to that. Line 10.

“Q. According to the policy, it was issued May 5th. A. What year was that?

Q. 1937. Do you remember, after thinking carefully, whether the policy was accepted immediately as issued when you brought it to the plaintiff? Do you remember any conversation regarding the terms and wording of the policy?”

Mr. Askren: While the answer does not hurt us, the conversation had between an insurance agent writing the policy and the man to whom the policy is delivered, no agent could have the right or the authority to make any statements that are not contained in the policy, as far as the question of indemnity is concerned, which is the question in issue in this case, and since there is no allegation in the complaint of that kind the question is an improper one.

The Court: I will sustain the objection.

“Q. Why did you take several months to deliver it?”

Mr. Askren: I object on the same ground.

The Court: The objection is sustained.

“Q. Do you remember the plaintiff refusing to accept the policy as it was?”

(Deposition of Newton C. Bader.)

Mr. Askren: I object to that.

The Court: The objection is sustained. [71]

Mr. Halverson: We are not raising any question on that.

“Q. Do you remember saying that you would write to the company for a clarification of the policy?”

Mr. Askren: We object to that as being immaterial.

The Court: The objection is sustained.

“Q. Do you remember the rider, the letter from Mr. Sullivan clarifying the terms of the policy? Do you remember delivering such a letter to the plaintiff?”

Mr. Askren: We object to that on the ground that is not the best evidence, and also there is no issue in the case on that. If there was a complaint as to a rider it should have been set out, and we should have had a chance to meet it.

Mr. Halverson: This letter we are referring to, Your Honor, is a letter that was issued prior to the time the letter we have been talking about was written, and the question on this particular letter that I am referring to and that is referred to in the deposition is a letter that frankly we do not have. We remember it, and we were endeavoring to establish a foundation to introduce secondary evidence as to the contents of that letter, and certainly it would have a bearing on the construction of this policy. In other words, one of the main issues, if

(Deposition of Newton C. Bader.)

not the main issue, in this case is going to be the construction of this policy. [72]

The Court: I will sustain the objection. Everything on page 10 I will sustain the objection.

Mr. Halverson: I might ask a question of Judge Askren. Have you been able to find that letter?

Mr. Askren: No, sir. Mr. Bader has no such letter and Mr. Sullivan has no such letter. I have a copy of the only letter that has passed in regard to the Fowles case, written about two years ago, in 1943, and prior to the time he was hurt, and while it has nothing to do with it—I might suggest this, as a matter of legal effect. Supposing at the time this policy was written this company wrote a letter in which we said under this policy we think you can only collect \$5.00 a week, in spite of the fact it says \$25.00. It would not be binding on Mr. Fowles. In other words, the policy provides itself what our rights are and no agent or no vice-president could write a letter in regard to it that would have any effect. It does not mean anything unless it was alleged something was done to affect the terms of the policy. Of course it would be immaterial any way, because it is not even an issue.

Mr. Halverson: I might add the only reason we are asking for this particular letter is the fact we cannot recall with any degree of certainty the contents of the letter, and we wanted it produced. I cannot do any more than produce testimony there was such a letter written, and [73] it referred to this policy. That is the situation in regard to that.

(Deposition of Newton C. Bader.)

Mr. Askren: I think on page 11 it is still along this line, about the letter.

The Court: It does not amount to anything, because he says he does not think he wrote such a letter. I will sustain the objection to everything on page 11.

Mr. Askren: I think everything down to line 27 on page 12.

The Court: This is the Insurance Commissioner Sullivan?

Mr. Askren: No; he is one of the vice-presidents of our company at San Francisco. At the bottom of the page is the first reference to a different letter that is now being asked about—a letter that she was supposed to have written.

Mr. Halverson: I do not want to pursue this any further except Judge Askren has stated there never was any such letter referred to, although at the bottom of page 11 Mr. Bader says: "Well, as I say, there was something in my mind about delivering a letter of some sort, but just what the terms and conditions, or what it was all about and why it was delivered I don't recall." I do not think his statement there never was such a letter is borne out by this testimony.

Mr. Askren: I did not mean to make a statement there was never such a letter. I say nothing was raised as an [74] issue about it, and we find in our files there was no such a letter written, and Mr. Bader has no such letter in his files.

The Court: I do not think you can vary the

(Deposition of Newton C. Bader.)

terms of the insurance policy by some letter that was supposed to have been written by an agent or officer of the company, and not in the nature of a qualified rider.

Mr. Halverson: No, but this letter was written by an officer of the company. As I understand the situation, it was a letter from Mr. Sullivan, who was vice-president of the Commercial Casualty Insurance Company, who forwarded the letter to Mr. Bader, who in turn delivered the letter to Mr. Fowles.

The Court: I will sustain the objection on that ground.

Mr. Askren: The next question is in line 27:

“Q. Do you remember receiving a letter from me regarding the effectiveness of the accident policy since the United States was engaged in war?

“Mr. Askren: Well, I think that the letter from Mrs. Fowles would be wholly immaterial and incompetent and irrelevant and a self-serving declaration. If you just want to call attention to an occasion, I have no objection to that, if you are just calling to his mind a certain time.

“Q. Do you remember an inquiry regarding the accident policy after war was declared? [75]

A. I really don't recall. I would have to look at my correspondence and find out. I don't know.

Q. I realize this is some time back and you handle a lot of claims.

A. A lot of things go over my desk and I don't recall it. I handle a lot of business.

(Deposition of Newton C. Bader.)

Mrs. Fowles: I wish to have this instrument marked Plaintiff's identification 'A' on the deposition.

(Instrument above referred to marked plaintiff's identification 'A' on deposition, the same being hereto attached and made a part of this deposition.)

Q. Is this your writing?

A. That is my stationery.

Q. Is that your signature? A. Yes.

Q. Do you now remember writing this letter in response to an inquiry as to the status of the policy?

A. Yes."

Mr. Askren: I will renew the objection on the ground that any letter written by Mr. Bader in response to a letter written by Mrs. Fowles cannot have any binding effect on the question. I object to it on the ground it is incompetent, irrelevant and immaterial. No agent has any right to do or say anything in regard to the construction of a policy that can change the terms of the policy. [76]

Mr. Halverson: On that letter, we feel it has a very important bearing as far as the construction of this policy is concerned. It is certainly notice with reference to the question of the alleged change of occupation, and at no time has it been asserted that by reason of his entering the armed services that Mr. Fowles was required to take a lesser payment under the policy than he otherwise would. It is our contention there is not and has not been any classification properly filed of risks that would in any

(Deposition of Newton C. Bader.)

way change the right to the benefits which we are entitled to under this policy. That is a question that I think is going to be very important in this case.

The Court: What is the date of the letter? It is a month before he was injured?

Mr. Halverson: As I recall the last premium would have been six months——

Mr. Askren: It was paid biannually.

Mr. Halverson: The last premium we would have paid would have been six months prior to May 5, 1943.

Mr. Askren: That is right. It is a six-months premium payment.

The Court: It seems to me if a person has an insurance policy and changes his occupation and writes to the company and says "Now, here, I am changing my occupation, and I don't know whether I want to continue this policy or not, if I am only going to get a small amount on it," is proper evidence. "If I am going to get the larger amount I will [77] pay my premium. Please tell me." And the company says: "There will be no change in the indemnity because of the change of occupation," and he makes payments of premiums that is not varying the terms of the contract, but it is in consideration of the company's assurance you are going to pay under the terms of the policy. I think such a letter would be admissable, but here you have no change of premiums and no change in conditions as a result of this letter, and since the interpretation of the policy would be by somebody that would have

(Deposition of Newton C. Bader.)

no right to interpret it, I don't think it is material.

Mr. Halverson: We had paid our premiums on this policy in advance, and it was paid up to May 5, 1943. Now that payment is an advance payment which carried this policy in force and effect until May 5, 1943.

(Argument by respective counsel.)

The Court: I will sustain the objection to this letter.

Mr. Halverson: May we have the letter marked as an identification in the record here, Your Honor?

The Court: Yes.

(Said letter marked plaintiff's exhibit "B" for identification.)

Mr. Halverson: It has been offered and the offer has been rejected. I might state the basis of my offer in this case is that it is offered on the ground and for the [78] reason that it shows that the company did not in any way construe this policy as containing a classification of risk that was more hazardous than the one in which the plaintiff was engaged at the time the policy was written; for the further reason it shows the company admitted it had no classification of risk on file, otherwise the company would have so notified the plaintiff, Mr. Fowles; further, that it is some evidence and an admission on the part of the company to the fact it had no more hazardous occupation classified and on file with the State Insurance Commissioner, and that it is further some evidence and an admission on the part

(Deposition of Newton C. Bader.)

of the company that it never called in the policy, cancelled it or requested that it be called in or cancelled, and is evidence the company considered the policy as being in full force and effect as written, so long as the insured was within the territorial jurisdiction of the United States.

The Court: The objection is sustained. Is that all of the deposition you care to read?

Mr. Halverson: I guess Judge Askren had some cross examination. There is a little more direct examination.

“Q. One more thing, Mr. Bader, did you know the National Guard was mobilized?

A. Yes, that was common knowledge; everyone knew that. [79]

Q. Did you know that the National Guard was made a part of the Army of the United States?

A. I believe so.”

“Cross Examination

By Mr. Askren:

Q. As I understand from you, Mr. Bader, you were not a general agent of the company?

A. No.

Q. The license you speak of is a license issued by the State of Washington which entitles you to act as agent or broker for the insurance companies?

A. Yes.

Q. When the state issues you that license that gives you statewide authorization unless the com-

(Deposition of Newton C. Bader.)

pany you work for now should say 'We want to confine your work within a certain radius,' something of that kind? A. That is right.

Q. The State agency is located in Seattle, is it not? A. Yes.

Q. He is the one who appoints—at least he, in company with the head office, appoints the different men. You have nothing to do with the appointing of other agents?

A. No, sir, nothing at all.

Q. And you have no general authority or other authority different than that possessed by the man in the smallest [80] community or anywhere else?

A. Or the largest community.

Redirect Examination

By Mrs. Fowles:

Q. Mr. Bader, did you receive your license or appointment as agent directly from the Seattle office? A. Yes.

Mrs. Fowles: Did I understand you, Judge Askren, to say that the area in which he solicits insurance was limited?

Mr. Askren: No. He spoke of the license, and I said the license you spoke of is the license issued by the State to a man to engage in the insurance brokerage or agency business, and that that gives him the right to sell insurance anywhere in the state with the exception that perhaps any individual company he might work for might say to him, 'Now, we have an agent in Tenino and an agent in Bu-

(Deposition of Newton C. Bader.)

coda, therefore don't you sell outside the city limits of Olympia, or don't sell in the smaller towns,' something of that kind."

Mr. Halverson: That is an argument by Judge Askren.

"The Witness: Certain companies give you a restricted district and other companies you can write anywhere.

Q. Did you write under a general agency?

A. I don't know what they call——(interrupted)

Q. Or did you deal directly with the Seattle office?

A. The Seattle office with this company is not a general [81] agent; they are a state agent.

Q. Seattle is headquarters for the state?

A. Yes, for western Washington, and I believe they have an office in Spokane for eastern Washington.

Q. Have you ever settled any claims for the company here? A. Yes.

Q. Have you delivered the checks?

A. Delivered the checks, certainly. All agents do the same thing.

Q. Did you handle the whole proceedings, or did someone come down from Seattle?

A. In some cases they came down from Seattle where I didn't have the time or was out of town on my trips, and in other cases I handled them all right there.

Q. If you were here you took charge of the settlement?

(Deposition of Newton C. Bader.)

A. No, not in all cases. Just depended on the conditions. If I had the time to do it, that was all.

Mrs. Fowles: That is all.

Recross Examination

By Mr. Askren:

Q. Your authority, Mr. Bader, as an agent in making a settlement of claims that were made, was that an authority which you had to submit to the higher-ups, to either the state or the general agent to get approval? A. Yes.

Q. You didn't have the authority on your own hook to make settlements? [82]

A. No, sir. No agent has that.

Redirect Examination

By Mrs. Fowles:

Q. Do you remember, Mr. Bader, saying that you had full authority to settle claims, that he need not worry?"

Mr. Askren: This is highly immaterial.

The Court: I sustained an objection to that previously, and I sustain the objection to this question.

"Q. When the plaintiff refused to accept the policy as it was, you say you don't remember advising that he was safe in taking it, that you would take care of it?

Mr. Askren: There is no evidence that he refused to take the policy."

The Court: I will sustain the objection. I will sustain the objection to the rest of the questions.

JUNE FOWLES

called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Halverson:

Q. I hand you here, Mrs. Fowles, plaintiff's exhibit for identification "C", and ask you to state what that is?

A. This is a telegram I received from Mr. Bader in answer to one I had sent to him informing him of my husband's injury and asking what the terms of the policy were. [83]

Mr. Askren: I do not think she should testify to the telegram she sent. That is not the best evidence, and I would like to know what that is.

Q. You received that from Newton C. Bader, of Olympia, Washington? A. Yes, sir.

Q. And that was received in reply to a letter or wire you sent to him?

A. A telegram I sent to him.

(Witness excused)

Mr. Halverson: I now desire to offer that in evidence.

Mr. Askren: I object on the same ground. This is apparently a telegram from Mr. Bader with regard to the policy—a statement by the agent, and it was after the accident took place.

The Court: There is no question about notice to

the company? You are not raising any issue that you were not notified?

Mr. Askren: There is no question about the fact we knew of the accident, and the only dispute is whether or not we have complied with the law.

The Court: I will sustain the objection.

Mr. Halverson: I desire to make an offer on that. The plaintiff offers identification "C" for the following [84] reasons: first, that it is a wire received from the agent of the company subsequent to the date of the injury; that it has some evidentiary value as to the proper construction of the policy as to whether the defendant insurance company considered it had a proper classification of risk on file, which in any way limited or changed the benefits payable under this policy to an amount less than \$25.00 a week.

The Court: You are talking about a proper classification of risk on file. Isn't that a matter to be proven by the records of the Insurance Commissioner?

Mr. Halverson: Yes.

Mr. Askren: As a matter of fact counsel and I have stipulated we can produce a letter from the Insurance Commissioner instead of bringing him here.

Mr. Halverson: We stipulated I would not require the Insurance Commissioner to come over, and if you said there was something on file I would not require it to be identified, but I am not stipulating they do have any classification of risk covering this policy.

Mr. Askren: That is what happens when you stipulate, Your Honor. I understood I could produce a letter from the Insurance Commissioner's office which would show we had on file our classifications, and it would show the amount, so the Court could see what our classification showed. Since then counsel mentioned last night that he has subpoenaed a [85] man out of the Insurance Commissioner's office, and he will have it here. I am not sure whether he is here at the moment.

Mr. Halverson: Yes, he is right here.

The Court: I do not see how a telegram could be of any value in determining what is on file in the State Insurance Commissioner's office. I will sustain the objection, and refuse to accept the offer of the proffered telegram.

Mr. Halverson: In view of Your Honor's ruling at the beginning as to the burden of proof, before resting my case it is my position that the question of a change of classification, if there was a change of classification, and likewise if there was a classification on file pertaining to this policy, that is a matter of defense. I do not know whether I correctly understood Your Honor at the beginning.

The Court: I do not think you have the burden of proof. I think under the pleadings you have the burden of going ahead with the testimony to show the allegations in your complaint are true. That is, that they have refused to pay on the ground there was a change of occupation. I do not think the burden of proof shifts. That is a

matter of defense. You sue on the policy and they then say the man was not covered to the extent of \$25.00 a week, and was [86] only covered to the extent of \$5.00 a week, because of a change of occupation. But I do think in order to sustain the burden you have of going ahead with the testimony, you would have to prove the reason why they refused to pay.

Mr. Halverson: That we have to prove the reason why the insurance company refused?

The Court: You have alleged in your complaint they have refused to pay more than \$5.00 a week, and state the reasons for it.

Mr. Halverson: I will call at this time Mr. Kuechelhan.

LEE I. KUECHELHAN

called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Halverson:

Q. Will you state your name to the Court, please? A. Lee I. Kuechelhan.

Q. What position do you hold?

A. Deputy Insurance Commissioner.

Q. Do you have with you and in your possession now the records and files of the office of the State Insurance Commissioner of the State of Washing-

(Testimony of Lee I. Kuechelhan.)

ton relative to the Commercial Casualty Insurance Company?

A. Yes, sir. I have certain of those records.

Q. Do you have all of the manuals or classifications of risk [87] that have been filed in the office of the State Insurance Commissioner of the State of Washington with you?

A. Yes, sir, with respect to the commercial division or the commercial section of the accident and health policies.

Q. Do you have a classification of risk that was filed in your office by the Commercial Casualty Insurance Company?

A. The first one I have here is commercial division accident and health manual filed in our office on May 29, 1929.

Mr. Halverson: Now, with reference to this, Your Honor, of course I am going to have to have this in evidence. I do not know how we are going to do it.

The Court: Let me see it. (handed to court)
This is an official file of the manual?

A. Yes, sir.

The Court: Have you a copy of the manual?

Mr. Madden: We do not have a copy of that particular one.

Mr. Halverson: It is our contention that the copy of the manual which they have is not controlling, and that likewise this one is not controlling, because this one was filed in 1929, and makes no mention whatsoever to the Star accident policy,

(Testimony of Lee I. Kuechelhan.)

form 14-H, and our contention is as to the other manual, which is referred to, and which Mr. Kuechelhan has here, has no application whatsoever to this policy.

Mr. Askren: This policy was written in 1937. This [88] manual is in 1929 he refers to.

The Court: When did they file a later manual?

Witness: I have another manual here of the commercial section filed October 1, 1932.

The Court: Is that the one you think controls?

Mr. Madden: That is right, Your Honor.

The Court: Is that a supplement to this one?

Mr. Halverson: No. It is our contention that is nothing more than an agents' manual, and has no reference to this policy whatsoever, and there is no way that it could be connected up with this policy, and as I remember the statute it says when the form of policy is filed there must be simultaneously filed a written classification of risks pertaining to that policy, and I think I have the authority directly in point.

Mr. Madden: The manual you have before you contains classifications of risks covering all the occupations they cover. At that time they put out several other policies. They have probably ten different types of policies, and all that is required is when they file the policy they file a statement of charges to be made for the issuance of the policy. The manual you have in your hand is a manual which is a continuing one until they amend it by filing another one, which is amendatory thereof,

(Testimony of Lee I. Kuechelhan.)

and that one there contains the company's classifications of risks, and the red [89] manual subsequently filed contains the classifications. The only thing the company must do when it files a new policy is to file a statement of rates for the issuance of that policy, and the classification does not change.

The Court: I have filed dozens and dozens of them. I never could get by without filing the coverage.

Mr. Madden: I do not understand.

The Court: You say only the rates need to be filed with the Insurance Commissioner. You have to file coverage too.

Mr. Madden: Yes, but in this case they had the classification of risk on file, and that is that black book, and the same risks applied to all the policies. The only question was one policy would cover down to a certain risk and the other would take more hazardous occupations.

Mr. Halverson: That does not cover all the policies. The front part of that mentions the policies to which that appertains, and it does not list the 14-H policy.

The Court: As a matter of procedure here, can we not put each one in an envelope and have the envelope marked, because we do not want to mark on the book, and you can offer both of them. I would say I think I should let in evidence all the records of the Insurance Commissioner that might

(Testimony of Lee I. Kuechelhan.)

even possibly pertain to this matter. I want the whole thing in. You can offer it, and have it marked as exhibit "D". We will have to figure out some way later of getting the record. Have you any objection to these? [90]

Mr. Askren: No.

The Court: That is the 1929 manual. Are you going to offer the 1932 one? (Exhibit "D" admitted in evidence.)

Mr. Halverson: No, Your Honor, because it is our position that has no application.

The Court: Are you going to offer it?

Mr. Askren: Yes.

The Court: We will mark that defendant's exhibit "1".

Witness: We can furnish a copy of the 1932 manual.

The Court: All right.

Mr. Halverson: So the record is clear, and I do not want Judge Askren to feel there has been any misunderstanding—there is not on my part—my objection does not go to the fact it was filed. I will admit this document was filed, but my objection goes to its relevancy, it has no reference to or connection with this policy.

The Court: That is what we will have the argument about. We will admit exhibit "1".

(1932 Manual admitted in evidence as defendant's exhibit "1".)

The Court: Have you anything else here?

(Testimony of Lee I. Kuechelhan.)

Witness: I have some things here. I don't know what you want.

Q. (Mr. Halverson): This policy was filed as of what time? This Star accident policy?

A. It is marked here as 14-H, filed in our office on June 3, 1931. [91]

Q. Does that have at the bottom of the page these numbers, A and H 5643-25M-11-30-7275?

A. That is right.

Q. That form of policy you have there which is shown as being filed on June 3, 1931, is the same as the plaintiff's exhibit "A", which is Star accident policy 14-S? A. It is identical with that.

Q. With the exception, Mr. Keuchelhan, of the plaintiff's exhibit "D" and the defendant's exhibit "1", do you have in the records and files of the State Insurance Commissioner's office any other schedule or classification of risks of the Commercial Casualty Insurance Company on file?

A. Do you mean of the commercial section?

Q. I mean for the Star accident policy.

A. No.

Q. With the exception of those two exhibits there is no other schedule of risks on file in your office with reference to a Star accident form policy?

A. Classification of risk?

Q. Yes. A. That is right.

Mr. Halverson: That is all.

(Testimony of Lee I. Kuechelhan.)

Cross Examination

By Mr. Madden: [92]

Q. May I see that hand-book?

A. That is another section.

Q. Have you got it there?

A. Yes, sir; this is it (indicating).

Q. Tell us what it is.

A. This is a classification manual of the accident and health department, general division, filed May 15, 1933.

Q. Showing you this black manual, will you state the classification of a postal service mail carrier, city, on foot? Shall I point to it?

Mr. Halverson: I think that is the best evidence of it.

Mr. Madden: There is no question about that, but I wanted it in the record.

The Court: I think it should be in the record.

A. Mail carrier, city, on foot, Class B.

Q. In that manual will you turn to army officer, if you can find it?

Mr. Halverson: I object to these questions on the ground and for the reason that this manual is not in any way applicable to this policy in question. It appears on the face of it it is not applicable to this policy in question.

The Court: You put it in evidence.

Mr. Halverson: I put it in evidence to show it does not apply. [93]

(Testimony of Lee I. Kuechelhan.)

The Court: It is a matter of cross examination.

Q. Did you find it? A. Yes, sir.

Q. Will you just read what you have for army officers giving the description and classification?

A. "Commissioned officers and enlisted men, army or navy, on active military or naval service anywhere in the world during war, insurrection, invasion or punitive expeditions (the term 'enlisted man' includes all men below the rank of a commissioned officer) (not insurable), Class K."

The Court: What does the term "not insurable" mean?

A. It means enlisted men below the rank of a commissioned officer are not insurable.

The Court: Are there two of them?

A. Yes.

Mr. Madden: I think the wording is the same in both.

Q. Now actually the Commercial Casualty Insurance Company did not file rates on the Star policy for a K classification, did it? They did not write down to that risk? A. That is right.

Q. Refreshing your recollection?

A. That is right, as far as the classifications are concerned.

Q. That have been filed with you. Their classifications indicate they write the Star accident policy only for risks to the extent of "D"? [94]

Mr. Halverson: I object to that. The record is the best evidence, and not what it would indicate

(Testimony of Lee I. Kuechelhan.)

they do. He has identified that in the record, and the record speaks for itself.

The Court: Yes. As far as being evidence is concerned that is true. I would like the assistance of this witness to explain what these things in the way of words mean, but it is not evidence. The manuals are the best evidence.

Mr. Halevrson: This man was not offered as an expert to explain them. We do not have any objection to going into anything that will assist Your Honor, but at the same time——

The Court: If he can help me in understanding the manuals I would like to have his assistance.

Mr. Madden: This man has been put on the witness stand to show we did not have the rates filed. This man can not change them and maybe he cannot interpret them, but——

The Court: It is 12 o'clock. Maybe you can get together during the noon hour and get the matter clarified.

(Whereupon a recess was had to the hour of 1:45 o'clock p. m. June 15, 1945, when the trial was resumed, the witness Keuchelhan again taking the witness stand.)

Q. (Mr. Madden): Mr. Keuchelhan, to go back for a moment, will you tell the Court what the procedure or requirement of the Insurance Commissioner is with regard to filing a manual of classification of risks when a new accident and [95] health company starts doing business in the state?

(Testimony of Lee I. Kuechelhan.)

Mr. Halverson: I object to that as being incompetent, irrelevant and immaterial. The procedure, as I view it, is set out in the statute, and that I respectfully submit is controlling.

The Court: He cannot vary the statute. He can state the procedure they use in applying the statute, but if it is not in conformity with the statute it will be of no value. Let me see the statute. (Statute handed the Court)

Mr. Halverson: 7233. And on that question I want to cite Your Honor the case of Nordin vs. Commercial Casualty Insurance Company, a Washington case, 176 Washington at page 59, which never has been overruled, modified or changed, and which construes that statute. (Citing and reading from said citation, and argument).

The Court: As long as we have gotten this far in this argument, I would like to hear from you on the other side. What is your position? (Argument by Mr. Madden)

The Court: Where is there anything in the red manual to comply with the requirements of the Nordin case? If you want to study the Nordin case you may do so.

Mr. Madden: I would be glad to.

The Court: We will take a few minutes recess.

(Short recess) [96]

Mr. Madden: Before continuing the cross examination I would like to ask one or two questions.

Q. (Mr. Madden): Do you have, Mr. Keuchel-

(Testimony of Lee I. Kuechelhan.)

han, a paper setting forth the premium rates and classifications for the Star accident policy?

A. Yes, sir; I have. There is one here in 1934, the Star policy (handing to Mr. Madden). There are others, but that is the latest one.

Q. May I see the others? (Witness hands to Mr. Madden)

A. Here is one that was filed at the time the policy form was filed (handing to Mr. Madden). And there is one here filed in 1939 (handing to Mr. Madden).

Q. I think that would not be pertinent. Have you a prorating form?

A. Yes, sir. We have two proratings and schedule of rates, one filed in August, 1934, and one in December, 1934.

The Court: Are they a part of your official records? A. Yes, sir.

The Court: Can you put them in an envelope? I do not like to mark up their file.

Mr. Madden: I would just as soon put them all in one envelope.

The Court: Yes.

(Envelope and contents marked for identification as defendant's exhibit "2".) [97]

The Court: We can arrange some way to have copies submitted.

Q. (Mr. Madden): Now, the Star accident policy, that is one policy—it is all the same form—each Star accident policy is not different?

(Testimony of Lee I. Kuechelhan.)

Mr. Halverson: The policies themselves would be the best evidence.

The Court: I will sustain the objection.

Mr. Halverson: Do I understand those have been offered?

The Court: Yes, they have been offered.

Mr. Halverson: I want to note an objection.

The Court: I will hear your objection.

Mr. Halverson: I object to them on the ground they are incomeptent, irrelevant and immaterial, and do not in any way tend to establish a schedule of risks applicable to the policy here in question. All they are, they purport to be a rate schedule which in no way satisfies the statute on the particular point here in question, and as I recall one of these which is filed June 3, 1931, applies only to classes A, B, C and D, and the policy number which appears at the bottom is not the same as the policy, plaintiff's exhibit "A", the wording at the bottom of this being Cas. A and H 5611-25M-11-30-7109, and the policy here in question being designated Cas. A and H 5643-25M-11-30-7275.

The Court: It may be admitted. [98]

(Envelope and contents admitted in evidence as defendant's exhibit "2".)

Mr. Madden: If Your Honor please, I should like now to take up the Nordin case. (Argument by Mr. Madden)

The Court: How can you get to K when you do not write K, when you refer in the manual to K as being non-insurable?

(Testimony of Lee I. Kuechelhan.)

Mr. Madden: Because we have situations such as the identical one before us now where a man goes from a B classification, which we do write, to a K classification. We cannot cancel the policy, and we have to have some basis upon which we can prorate the difference between the two and find out what he is entitled to. If Your Honor will look at the prorating—this is the prorating schedule where it goes only to J, and it comes out mathematically about the same, but we are estopped to prorate it any lower than J, because that is as far as we have gone. In that prorating schedule they did not go any further than J, because that is the limit they write in any policy, whether it is a Star or any other policy. The Star is a preferred risk policy where they write only to D. (Argument)

The Court: Which one of these do you contend complies with the requirement of the Nordin case, which says you must file a schedule appertaining to the policy?

Mr. Madden: I contend that the red manual is the one upon which we have a right to depend. In other words, the [99] black manual has a schedule of risks, and it was superceded by the risks in the red manual. Then together with that we have filed a schedule of rates wherein we set forth the risks as A, B, C, D and E. (Argument)

The Court: Do you know whether this company had a manual on file prior to 1929?

Witness: I could not tell you that. I thought

(Testimony of Lee I. Kuechelhan.)

I had all the manuals they had on file. They asked me to bring those over with me.

The Court: When the new manual is filed do you release the old one?

Witness: We would keep that old manual on file unless they directed us to void that manual, and this would apply to everything. Between the time that manual was filed and this one there were many policies written. This manual would cover then on anything that was written while that was on file and before this one was filed (indicating).

Mr. Madden: May I add something to that? The company does not withdraw any manual, for the reason the policy may be in effect for 30 or 40 years.

The Court: Yes. All right, go ahead.

Q. (Mr. Madden): Mr. Keuchelhan, when a manual of risks is filed by a company and a new policy is thereafter filed, do you require a new filing of another manual of risks?

Mr. Halverson: Just a minute. I object to that. [100]

The Court: I think the objection is well taken, but I will let him answer the question.

A. As far as I know, the Commissioner's office does require an additional classification manual to be filed unless it may be some special policy form applying only to certain classes.

Q. But if the new policy embraces the same classification as to A, B, C, D, that has already

(Testimony of Lee I. Kucchelhan.)

been filed by the manual of risks, the old manual on file applies to the new policy?

A. It is considered sufficient as a rate sheet with reference to a class.

Mr. Halverson: It is understood this is going in over my objection?

The Court: Yes. It is all over your objection.

Mr. Madden: That is all.

Re-Direct Examination

By Mr. Halverson:

The Court: Should we cross out this June 5, 1942, on the front of this red manual and write down here "Effective March 1, 1932"?

Q. (Mr. Halverson): I hand you here part of defendant's exhibit "2", dated June 3, 1931, which is entitled "Premium Rates for Star Accident Policy", and I will ask you to state if that is the premium rate that was filed with the Star accident policy, being plaintiff's exhibit "A", in your office?

A. Yes. That rate sheet is attached to the policy and it is identical with this one, is it not (indicating)?

Q. Yes. A. That is right.

Q. And that refers to classes A, B, C, and D?

A. That is right.

Q. How long have you been in the office of the Insurance Commissioner?

A. I have been with the office since 1938.

Mr. Halverson: That is all.

Mr. Madden: That is all.

(Witness excused)

Mr. Halverson: I haven't had an opportunity to compare these, and I assume the fact one has a 1942 stamp on it does not mean it was a later edition.

The Court: Are you sure?

Mr. Madden: I am positive they are identical. I have compared them quite thoroughly.

Mr. Halverson: The plaintiff rests, Your Honor.

Defendant's Evidence:

KEITH FISK

called as a witness by the Defendant, first duly sworn, testified as follows:

Direct Examination

By Mr. Askren: [102]

Q. Please state your name.

A. Keith Fisk.

Q. What is your occupation?

A. An employee of the Loyalty Group of insurance companies, one of which is the Commercial Casualty Insurance Company.

Q. And you have been with them a number of years?

A. Five years.

Q. Are you familiar with the form and so forth of the policies they write?

A. Yes.

Q. I will show you what has been marked as plaintiff's exhibit "A", and I will ask you whether or not all Star accident policies written by the

(Testimony of Keith Fisk.)

Commercial Casualty Insurance Company are on this identical shape of paper and the same printing and everything?

Mr. Halverson: I object to that as not being the best evidence. Whether or not this is the same as all of them would depend on the particular instrument involved.

The Court: He said he had been with them only five years.

Mr. Askren: But it will be as to the five-year period he has been with them. This is attempting to prove a negative, because of the fact when Mr. Kuechelhan was asked if all Star policies were the same, the objection was raised he had not seen them all, but this is a man in the company. [103]

The Court: He testified this policy was written in 1937. Can he testify all policies in 1937 are the same? That is what we are interested in.

Mr. Askren: Perhaps if counsel will not agree I will have to ask for a continuance to furnish that information. Counsel raised the question whether the Star policy was covered by the rates.

The Court: I think I would be in error to let this man testify now and draw a conclusion from it. I don't think your record would be any better than the record in the Nordin case.

Mr. Askren: That is beyond the five-year period, but he is the only man here that has familiarity with it.

The Court: I will give you time to prove that,

(Testimony of Keith Fisk.)

Judge, but I do not think it should rest on testimony of this kind.

Mr. Askren: This will be my last witness. May we have a few minutes' recess to consider it, because I think I can convince counsel very quickly.

The Court: All right. I want to read this case anyway.

(Short recess)

Mr. Askren: In discussing the matter with counsel, we found among ourselves on investigation, that some of the Star policies, there have been changes—I do not know whether they are slight or major—but in any event the thing I was suggesting to counsel was something he does not [104] want to agree to, and I was thinking in good faith all of the Star policies had exactly the same wording, but there is some slight change, and I am unable to go any further, and I am unable to ask counsel to make a stipulation. There is one thing in connection with it about which I am a little embarrassed because of the situation. Does Your Honor intend to leave Yakima at the end of this week?

The Court: Yes.

Mr. Askren: The first time I heard there would be a question about it was ten minutes to six last night, and I haven't had a chance to communicate with the company in San Francisco, and therefore I have not been able to present it as carefully as I should. I was not the company's counsel at the

time the Nordin case was tried, and I am not familiar with it, but in any event I should like to have additional time if it could be given me. I will not be able to get somebody here from San Francisco to testify to it, and I assume Your Honor will leave the bench at the end of the month, and I should like, if it were possible, to be able to get this information from San Francisco in connection with it, so I will be better able to explain the particular situation in regard to these policies. I am satisfied in my own mind that the insurance company, being faced with the decision, the Insurance Commissioner's office having accepted the filing, and no [105] question having been raised from that time on until it was raised now, there is no doubt a good and sufficient answer to it.

I want as far as this particular phase of the case is concerned to see that all these exhibits brought over by the Insurance Commissioner have been offered in evidence, so there will be no question about all of our rates that were filed being presented to the Court. I do not mean to go beyond the date Your Honor set in 1937, but from the date of the policy down to the present time, or before the policy was issued up to that time, those are factors that should be considered by the Court, and——

The Court: I have let everything in.

Mr. Askren: I wanted to be sure they were before Your Honor, and that being true I will rest my case, because I cannot in reason ask for time to get somebody here in case I can furnish the

explanation, if Your Honor is not going to be available to receive it.

The Court: I hate to put you in that position, Judge, but I do have to get things finished. I have four cases under advisement I have to decide next week, and I have to get started to Washington some time.

Mr. Askren: In all the discussions back and forth I never knew until ten minutes to six the question was going to arise. There is nothing in the pleadings to indicate it. [106] I do not mean to say counsel misled me, but we discussed a lot of things and nothing was said until ten minutes to six last night, so I did not have an opportunity to get any information on that point.

Mr. Halverson: So I may explain my situation, counsel says he knew nothing about this. Last night at six o'clock he came in my office, and at that time counsel was very positive he never had been served with a reply in this case, and asserted very definitely that if it was filed there would be fireworks about it, and I was quite concerned about the matter myself, because I had not handled this, and it developed, however, that the reply was served upon Judge Askren and was accepted in his own handwriting. I am not sure of the date, but the record will show.

Now as far as the question of this issue being presented, I do not know where counsel gets his idea that it was not going to be presented unless it follows his assumption we had filed no reply and were going to admit all of that, but certainly

Mr. Madden was down at Olympia, I think the same day that Mrs. Fowles was there, checking these various matters over. We served in this case a subpoena on the Insurance Commissioner, and that subpoena is very broad, a subpoena duces tecum, and we required him to bring in all of the records and files in his office relating to this policy, all schedules of risk filed, all rate [107] schedules filed and all other papers in his office relating to this matter. I might read it if Your Honor is interested in it. Counsel knew that I was having this subpoena issued. Do you have the original, Mr. La Framboise?

Clerk La Framboise: No original has been filed yet.

The Court: You allege in your answer he was classified in Class K for rate purposes. You have never filed anything about Class K with the Commissioner with reference to the Star policy.

If it would be of any assistance to you, Judge Askren, to let you come to Spokane next week, if Mr. Halverson will consent to it, you could 'phone down to San Francisco, and I will be here tomorrow morning.

Mr. Askren: I am afraid I would not be able to get the information so I could present it. I would have one of the men fly up. It may be he cannot get it.

I do not want counsel to feel that I accused counsel of any bad faith. I said in the discussion it did not even occur to me there was a question about the rates being right, and that they had been

properly filed. It is true they were denied in the reply. The reply was lost in our office, and nobody in that office knows where it is. I signed it, and I have never seen it since. I assumed there was no question about it.

The Court: Under the general federal rules a reply is unnecessary. The affirmative matters are deemed denied. [108] But we have a special rule in this district requiring a reply.

Mr. Askren: I was not complaining about it not being served, but I did not know it would be an issue. I am not accusing counsel, and I did not intend to be negligent in the matter.

The Court: Mr. Kuechelhan, did you bring everything with you in the Insurance Commissioner's files?

Witness Kuechelhan: Yes. Everything I could find on this particular Star policy back as far as 1929, which was some eight years prior to the date of this policy.

The Court: Have you seen everything he has?

Mr. Askren: Yes. I will take his statement that is all they have.

The Court: I do not see anything they could bring up from San Francisco. As you have the evidence here from the Commissioner's office, I do not see how they could bring up anything from San Francisco that would add to it.

Mr. Askren: It seems to me it cannot be possible, after they were stuck for the full amount of the policy of insurance, this had not been done. It may be I could not find anything, but if the

decision should go against my company, I do not want the company to feel I have not properly presented the matter. [109]

Mr. Halverson: It seems to me it is not what they have in San Francisco. It is what they had on file in the office of the Insurance Commissioner of the State of Washington. They have no right to write any policy unless they have first filed it in that office, and followed these other steps, whether they had any number of different forms or they were all the same. The question resolves itself back to what was on file in the Commissioner's office.

The Court: Let us close the case and argue it. If you find out something in the next few days you will have to come to Spokane.

Mr. Askren: I would be glad to do it.

The Court: We will go ahead. Have you any other testimony?

Mr. Askren: No; that is all.

The Court: All right, Mr. Halverson.

(Mr. Halverson, Mr. Askren and Mr. Maden then argued to the Court.) (At the conclusion of the argument the Court rendered the following oral decision:)

ORAL DECISION OF THE COURT

The Court: I am not going to pass upon the question of the change of occupation, nor determine the question of whether or not it needs to be voluntary. I am expressing no opinion on that one way or the other, and I am not [110] deciding

the case upon the basis of estoppel, although I will say it occurs to me there was some obligation on the part of this company, knowing this man was in the National Guard, and knowing that the National Guard was mobilized in 1941, there was some obligation on its part to not accept the premiums from which he was to get \$25.00 a week and not let him know if he got injured as he did here that they intended only to pay him \$5.00 a week, and make certain mental reservations on it.

I am deciding the case upon the basis of the Nordin case. Counsel refers to it as a technicality. It may be. If it was a technicality it was pointed out to this particular company very definitely and emphatically by the Supreme Court of the State of Washington, and they knew it was not a mere technicality before, and they should have complied with the requirements of the Supreme Court's ruling. I see no question about the company's failure to comply with the statute as the statute has been interpreted by the Supreme Court.

I am reading from *Nordin vs. Commercial Casualty Insurance Company*, 176 Washington, 64:

"The determinative feature of this case, as we view it, rests upon the respondent's failure to establish the fact that it had filed with the Insurance Commissioner of this state a copy of its classification of risks pertaining [111] to the policy in suit, as required by the statute.

"Rem. Rev. Stat., Sec. 7233, provides that no accident insurance policy shall be issued or delivered until a copy of the form thereof and of the

classification of risks pertaining thereto have been filed with the Insurance Commissioner.

“Thus it will be seen that the policy is to be held a valid and binding contract, but, in so far as it conflicts with Sec. 7233, *supra*, the provisions of the latter shall govern. Expressed according to result, the policy does not draw to itself, as part thereof, any classification of risks therein referred to, unless a form of such classification pertaining to the particular policy has been filed in accordance with law.”

Now counsel for the defendant takes the position that the defendant's exhibit “1” was controlling at the time the policy was issued.

This is the manual of the Loyalty Group. It is not even a manual of this particular insurance company, but a manual of the Loyalty Group, of which this insurance company is a member, and it limits the risk on all policies issued by whatever companies are members of the Loyalty Group.

The testimony of the witness from the Insurance Commissioner's office that they filed it with the Star [112] policy at the time it was filed, must be construed to be an attempt to comply with the classification requirement pertaining to the policy, and not in a classification of the limitations of the risk. It has classes A, B, C and D, and is the premium rate for those accident policies. These other papers that were filed are nothing more than premium rates.

I agree with Judge Askren that I cannot conceive of this company, having gone through this

experience once, that they would turn around and do it just as bad over again, but after this case was decided in January, 1934, they had on file their manual for the whole Loyalty Group of insurance companies, not referring to any policy, and then they say that these papers they filed of statements of premium rates are sufficient to meet the requirements.

It is true they did not have all the evidence before them in that case that they wanted to have, but you have all of it here, and there just isn't anything here that the statute was complied with and that they filed any classification pertaining to this policy. They didn't even file a classification of risks pertaining to the Commercial Casualty Insurance Company, but filed a general classification of risks for all the companies in the Loyalty Group.

I will hold in favor of the plaintiff. On this [113] question of the hospital, the plaintiff is entitled to recover for that portion of the time—he was in this hospital five weeks, wasn't he?

Mr. Halverson: Yes; in the Hahnemann Hospital.

The Court: He is not entitled to recover during the time he was in a government hospital. Is there any other question about the amount involved?

Mr. Halverson: No, Your Honor.

Mr. Askren: There will not be any dispute on that. Will Your Honor give me an opportunity to look into this matter further?

The Court: Yes. If you find something more.

If this is all that was filed, I am satisfied it is not sufficient to comply. It is not your fault. The company got itself in that trouble once, and they should have had a little more care not to do it again.

Mr. Askren: I do not want to reargue it.

The Court: If you have something further, if you find something further, you can 'phone me. I will be in Spokane and it may be we can arrange for you to come over there. I will not foreclose you if you can find some other facts. We should get copies of these exhibits as quickly as possible. The Insurance Commissioner will want them back.

Mr. Askren: Would it be agreeable to the Court and [114] counsel—perhaps I can get a copy of the black book from San Francisco. We have copies of the red book, and we can have copies made of these others so we can keep in the record exactly the same things. It would not be much trouble to copy these other things. Would that be agreeable?

Mr. Halverson: Yes, surely. There is one thing in connection with this case, the deposition here that was taken in Philadelphia is addressed through error to June Fowles, "Clerk of the District Court", and we believe our copy of the deposition is included with the original. It became immaterial in view of the stipulation, and I wonder if it might be published and we be permitted to withdraw simply our copy of it.

The Court: Yes.

Mr. Halverson: It contains the X-rays, but we are only interested in withdrawing our copy.

Mr. Askren: We have no objection.

The Court: It may be published.

(Court was then adjourned.) [115]

This cause came on for argument on defendant's motion for a new trial, at Spokane, Washington, at the hour of 2:18 o'clock p. m., June 22, 1945; C. W. Halverson and June Fowles appearing as attorneys for the plaintiff, and William J. Madden appearing of counsel for the defendant on behalf of the defendant, whereupon the following proceedings were had, to-wit:

The Court: I want to make a further record in this case of Fowles vs. Commercial Casualty Insurance Company.

During the trial there was admitted in evidence defendant's exhibit "1", which is the manual of the accident and health division of the Loyalty Group, commercial section.

The witness who had the difficult name to pronounce——

Mr. Madden: Mr. Kuechelhan.

The Court: From the office of the Insurance Commissioner, had brought on subpoena the original which was filed with his office, effective October 1, 1932. In order not to take from the records of the Insurance Commissioner their part of the file which was necessary, it was stipulated that a copy could be substituted for the original, and this exhibit "1" is the copy which was substituted.

In my oral opinion at the close of the trial, I called attention to the fact that I had before me the exhibit as it was introduced. I called attention to the [116] fact that this manual did not refer to the defendant Commercial Casualty Insurance Company, but only referred to the Loyalty Group, of which the Commercial Casualty Insurance Company is a member.

I placed no particular emphasis on that point, and I don't think it makes any difference in the outcome of the case. I do not think it makes any difference in my decision of the case.

After the trial was over the representative of the Commissioner's office called the attention of the Clerk to the fact the original that was on file had typed or stamped on it the name of the defendant Commercial Casualty Insurance Company, so I wanted the record to contain this statement, showing that while my statement was correct as far as the copy was concerned, it was not correct as far as the original was concerned—the exhibit was not a true copy of the manual, in that it does not contain the stamped or printed language naming the Commercial Casualty Insurance Company. Does that take care of it?

Mr. Madden: Yes; that is satisfactory, Your Honor.

(Mr. Madden then argued the motion of defendant for a new trial.)

The Court: The motion will be denied.

(No further proceedings had.) [117]

DEFENDANT'S EXHIBIT No. 2 COMMERCIAL CASUALTY INS. CO.

PREMIUM RATES FOR THE STAR ACCIDENT POLICY

Rates for each	CLASS A		CLASS B		CLASS C		CLASS D*	
	Ages 18-60	Ages 61-65	Ages 18-60	Ages 61-65	Ages 18-60	Ages 61-65	Ages 18-55	Ages 55-60
<div> 1,500.00 Principal Sum and \$5.00 Weekly Accident Indemnity </div>	\$2.00	\$4.10	\$2.40	\$5.25	\$2.80	\$6.40	\$3.40	\$7.15
	3.00	3.00	3.60	3.60	4.20	4.20	5.10	5.10
	\$5.00	\$7.10	\$6.00	\$8.85	\$7.00	\$10.60	\$8.50	\$12.25

Limits.

Policies may be issued in any combination of Principal Sum and Weekly Indemnity not exceeding \$30,000.00 Principal Sum and \$100.00 Weekly Indemnity. Applications in excess of these amounts may be submitted to the Home Office for special consideration. Policies must not be issued where the Principal Sum exceeds \$1,500.00 for each \$5.00 weekly indemnity.

Filed.....
Effective Jun 3 - 1931

Defendant's Exhibit No. 2—(Continued)

COMMERCIAL CASUALTY INS. CO.

LOYALTY GROUP

PREMIUM RATES

for

New Ultimate Accident Policy

New Ultimate Disability Policy

Income Accident Policy

Income Disability Policy

Majestic Accident Policy

Star Accident Policy

Sterling Life & Limb Policy

LOYALTY GROUP

Premium Rates for New Ultimate Accident Policy

Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$ 7.40
Class B	7.20	9.10
Class C	8.40	10.80

	Ages 18-54	Ages 55-69
Class D*	10.20	12.70

(Rates below for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for New Ultimate Disability Policy
Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Accident Rates		Sickness Rates	
	Ages 18-60	Ages 61-69	Ages 18-50	Ages 51-55
Class A	\$6.00	\$7.40	\$6.00	\$10.00
Class B	7.20	9.10	6.00	10.00
Class C	8.40	10.80	6.00	10.00
	Ages 18-54	Ages 55-69		
Class D*	10.20	12.70	6.00	10.00
(Rates below for use only in prorating claims)				
Class D	10.20	12.70	-----	-----
Class E	12.00	15.00	-----	-----
Class F	21.00	24.00	-----	-----
Class G	24.00	27.00	-----	-----
Class H	30.00	33.00	-----	-----
Class I	36.00	39.00	-----	-----
Class J	42.00	45.00	-----	-----

Premium Rates for Income Accident Policy Weekly
Indemnity \$5.00

	Ages 18-69
Class A	\$4.00
Class B	4.80
Class C	5.60
Class D*	6.80
(Rates below for use only in proating claims)	
Class D	6.80
Class E	8.00
Class F	14.00
Class G	16.00
Class H	20.00
Class I	24.00
Class J	28.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Income Disability Policy
Weekly Indemnity \$5.00

	Accident Rates	Sickness Rates	
	Ages 18-69	Ages 18-50	Ages 51-55
Class A	\$4.00	\$6.00	\$10.00
Class B	4.80	6.00	10.00
Class C	5.60	6.00	10.00
Class D*	6.80	6.00	10.00

(Rates below for use only in prorating claims)

Class D	6.80	-----	-----
Class E	8.00	-----	-----
Class F	14.00	-----	-----
Class G	16.00	-----	-----
Class H	20.00	-----	-----
Class I	24.00	-----	-----
Class J	28.00	-----	-----

Premium Rates for Majestic Accident Policy
Principal Sum \$1000.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$7.40
Class B	7.20	9.10
Class C	8.40	10.80

	Ages 18-54	Ages 55-69
Class D*	10.20	12.70

(Rates for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Star Accident Policy
Principal Sum \$1500.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$5.00	\$7.10
Class B	6.00	8.85
Class C	7.00	10.60

	Ages 18-54	Ages 55-69
Class D*	8.50	12.25

(Rates below for use only in prorating claims)

Class D	8.50	12.25
Class E	10.00	14.50
Class F	17.50	22.00
Class G	20.00	24.50
Class H	25.00	29.50
Class I	30.00	34.50
Class J	35.00	39.50

Premium Rates for Sterling Life and Limb Policy
Principal Sum \$1000.00

	Ages 18-60	Ages 61-69
Class A	\$3.00	\$4.40
Class B	3.60	5.50
Class C	4.20	6.60

	Ages 18-54	Ages 55-69
Class D*	5.10	7.60

(Rates below for use only in prorating claims)

Class D	5.10	7.60
Class E	6.00	9.00
Class F	10.50	13.50
Class G	12.00	15.00
Class H	15.00	18.00
Class I	18.00	21.00
Class J	21.00	24.00

Filed.....
Effective Sep 21 1931

Defendant's Exhibit No. 2—(Continued)

LOYALTY GROUP

COMMERCIAL CASUALTY INS. CO.

PREMIUM RATES

for

New Ultimate Accident Policy

New Ultimate Disability Policy

Income Accident Policy

Income Disability Policy

Majestic Accident Policy

Star Accident Policy

Stering Life and Limb Policy

LOYALTY GROUP

Filed.....

Effective Aug 1 - 1934

Premium Rates for New Ultimate Accident Policy

Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$7.40
Class B	7.20	9.10
Class C	8.40	10.80
	Ages 18-54	Ages 55-59
Class D*	10.20	12.70

(Rates below for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H.....	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for New Ultimate Disability Policy
Principal Sum \$1000.00. Weekly Indemnity \$5.00

	Accident Rates		Sickness Rates	
	Ages 18-60	Ages 61-69	Ages 18-50	Ages 51-55
Class A	\$6.00	\$7.40	\$6.00	\$10.00
Class B	7.20	9.10	6.00	10.00
Class C	8.40	10.80	6.00	10.00
	Ages 18-54	Ages 55-69		
Class D*	10.20	12.70	6.00	10.00
(Rates below for use only in prorating claims)				
Class D	10.20	12.70	.....	.....
Class E	12.00	15.00	.....	.....
Class F	21.00	24.00	.....	.....
Class G	24.00	27.00	.....	.....
Class H	30.00	33.00	.....	.....
Class I	36.00	39.00	.....	.....
Class J	42.00	45.00	.....	.....

Premium Rates for Income Accident Policy
Weekly Indemnity \$5.00

Ages 18-69	
Class A	\$4.00
Class B	4.80
Class C	5.60
Class D*	6.80
(Rates below for use only in prorating claims)	
Class D	6.80
Class E	8.00
Class F	14.00
Class G	16.00
Class H	20.00
Class I	24.00
Class J	28.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Income Disability Policy
Weekly Indemnity \$5.00

	Accident Rates	Sickness Rates	
	Ages 18-69	Ages 18-50	Ages 51-55
Class A	\$4.00	\$6.00	\$10.00
Class B	4.80	6.00	10.00
Class C	5.60	6.00	10.00
Class D*	6.80	6.00	10.00

(Rates below for use only in prorating claims)

Class D	6.80
Class E	8.00
Class F	14.00
Class G	16.00
Class H	20.00
Class I	24.00
Class J	28.00

Premium Rates for Majestic Accident Policy
Principal Sum \$1000.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$6.00	\$7.40
Class B	7.20	9.10
Class C	8.40	10.80

	Ages 18-54	Ages 55-69
Class D*	10.20	12.70

(Rates below for use only in prorating claims)

Class D	10.20	12.70
Class E	12.00	15.00
Class F	21.00	24.00
Class G	24.00	27.00
Class H	30.00	33.00
Class I	36.00	39.00
Class J	42.00	45.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Star Accident Policy
Principal Sum \$1500.00. Weekly Indemnity \$5.00

	Ages 18-60	Ages 61-69
Class A	\$5.00	\$7.10
Class B	6.00	8.85
Class C	7.00	10.60
	Ages 18-54	Ages 55-69
Class D*	8.50	12.25

(Rates below for use only in prorating claims)

Class D	8.50	12.25
Class E	10.00	14.50
Class F	17.50	22.00
Class G	20.00	24.50
Class H	25.00	29.50
Class I	30.00	34.50
Class J	35.00	39.50

Premium Rates for Sterling Life and Limb Policy
Principal Sum \$1000.00

	Ages 18-60	Ages 61-69
Class A	\$3.00	\$4.40
Class B	3.60	5.50
Class C	4.20	6.60
	Ages 18-54	Ages 55-69
Class D*	5.10	7.60

(Rates below for use only in prorating claims)

Class D	5.10	7.60
Class E	6.00	9.00
Class F	10.50	13.50
Class G	12.00	15.00
Class H	15.00	18.00
Class I	18.00	21.00
Class J	21.00	24.00

Defendant's Exhibit No. 2—(Continued)

PREMIUM RATES

for

Star Accident Policy

Star Income Accident Policy

Majestic Accident Policy

Sterling Life and Limb Policy

Simplex Accident Policy

Simplex Disability Policy

Effective December 1st, 1934

The Rates contained herein are to be used by Claim Offices as
a guide in prorating Accident Claims

ACCIDENT AND HEALTH DIVISION

LOYALTY GROUP

COMMERCIAL CASUALTY INS. CO.

Premium Rates for Star Accident Policy

Principal Sum \$1000.00 Weekly Indemnity \$5.00

	Male Risks		Female Risks
	Ages 18-59	Ages 60-69	Ages 18-59
Class A	\$5.00	\$6.40	\$6.00
Class B	6.00	7.90	7.00
Class C	7.00	9.40	8.50
	Ages 18-54	Ages 55-69	Ages 18-54
	8.50	11.00	10.00
Class D*			

(Rates below used only in prorating claims)

Class D	8.50	11.00	10.00
Class E	11.00	14.00	13.00
Class F	13.50	16.50	15.50
Class G	16.00	19.00	18.00
Class H	21.00	24.00	23.00
Class I	26.00	29.00	28.00
Class J	31.00	34.00	33.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Star Income Accident Policy
\$5.00 Weekly Indemnity

	Male Risks Ages 18-69	Female Risks Ages 18-59
Class A	\$3.00	\$3.60
Class B	3.60	4.20
Class C	4.20	5.10
Class D*	5.10	6.00

(Rates below used only in prorating claims)

Class D	5.10	6.00
Class E	6.60	7.80
Class F	8.10	9.60
Class G	9.50	11.30
Class H	12.35	14.70
Class I	15.30	18.25
Class J	18.30	21.45

(269)

Premium Rates for Majestic Accident Policy
\$5000.00 Principal Sum. \$25.00 Weekly Indemnity
\$500.00 Medical Reimbursement

	Ages 18-59	Ages 60
Class A	\$35.00	\$42.00
Class B	42.00	51.50
Class C	50.00	62.00

	Ages 18-54	Ages 55-69
Class D*	60.00	72.50

(Rates below used only in prorating claims)

Class D	60.00	72.50
Class E	77.00	92.00
Class F	94.50	109.50
Class G	112.00	127.00
Class H	147.00	162.00
Class I	182.00	197.00
Class J	217.00	232.00

Defendant's Exhibit No. 2—(Continued)

Premium Rates for Sterling Life & Limb Policy
\$5000.00 Principal Sum. \$500.00 Medical Reimbursement

	Male Risks		Female
	Ages 18-59	Ages 60-69	Ages 18-69
Class A	\$23.50	\$30.50	\$20.00
Class B	27.50	37.00	23.00
Class C	32.00	44.00	28.00
	Ages 18-54	Ages 55-69	Ages 18-54
Class D*	37.50	50.00	33.75
(Rates below used only in prorating claim)			
Class D	37.50	50.00	33.75
Class E	51.70	66.70	44.00
Class F	63.45	78.45	54.00
Class G	75.20	90.20	64.00
Class H	98.70	113.70	84.00
Class I	122.20	137.20	104.00
Class J	145.70	160.70	124.00

Rates for Simplex Accident Policy and Accident Portion of
Simplex Disability Policy

\$1000.00 Principal Sum. \$50.00 Monthly Indemnity

	Ages 18-59	Ages 60-69
Class A	\$10.50	\$12.60
Class B	12.60	15.45
Class C	14.70	18.30
	Ages 18-54	Ages 55-69
Class D* & D.....	17.85	21.60
Class E	21.00	25.50
Class F	26.25	30.75
Class G	31.50	36.00
Class H	42.00	46.50
Class I	52.50	57.00
Class J	63.00	67.50

Business women whose occupations take classes A and B, charge C class rate. All other occupations charge one classification higher than men in the same occupation.

Age limits Female risks 18-59 inclusive.

For maximum limits of Single Principal Sum and/or Single Weekly or Monthly Indemnity for the various classifications refer to our Commercial Division Accident Classification Manual.

(269a)

STAR ACCIDENT POLICY

Annual Premium Rates for Selected Male Risks

Principal Sum	Weekly Ind.	CLASS A		CLASS B		CLASS C		CLASS D*	
		Ages 18-59	Ages 60-65	Ages 18-59	Ages 60-65	Ages 18-59	Ages 60-65	Ages 18-54	Ages 55-65
\$1,000.00	\$ 5.00	\$ 5.00	\$ 6.40	\$ 6.00	\$ 7.90	\$ 7.00	\$ 9.40	\$ 8.50	\$11.00
	10.00	8.00	9.40	9.60	11.50	11.20	13.60	13.60	16.10
	15.00	11.00	12.40	13.20	15.10	15.40	17.80	18.70	21.20
	20.00	14.00	15.40	16.80	18.70	19.60	22.00	23.80	26.30
	25.00	17.00	18.40	20.40	22.30	23.80	26.20	28.90	31.40
	50.00	32.00	33.40	38.40	40.30	44.80	47.20	54.40	56.90
5,000.00	25.00	25.00	32.00	30.00	39.50	35.00	47.00	42.50	55.00
	50.00	40.00	47.00	48.00	57.50	56.00	68.00	68.00	80.50
	75.00	55.00	-----	66.00	-----	77.00	-----	-----	-----
	100.00	70.00	-----	84.00	-----	98.00	-----	-----	-----
10,000.00	50.00	50.00	64.00	60.00	79.00	70.00	94.00	85.00	110.00
	75.00	65.00	-----	78.00	-----	91.00	-----	-----	-----
	100.00	80.00	-----	96.00	-----	112.00	-----	-----	-----
20,000.00	100.00	100.00	-----	120.00	-----	140.00	-----	-----	-----

Limit of risk ages 18-59 inclusive \$20,000.00 P.S. and \$100.00 W.I. Ages 60 or over, \$10,000.00 P.S. and \$50.00 W.I.

Defendant's Exhibit No. 2—(Continued)

STAR ACCIDENT POLICY

Annual Premium Rates for Selected Female Risks

Principal Sum	Weekly Ind.	CLASS A	CLASS B	CLASS C	CLASS D*	
		Ages 18-59	Ages 18-59	Ages 18-59	Ages 18-54	Ages 55-59
\$1,000.00	\$ 5.00	\$ 6.00	\$ 7.00	\$ 8.50	\$10.00	\$13.00
	10.00	9.60	11.20	13.60	16.00	19.00
	15.00	13.20	15.40	18.70	22.00	25.00
	20.00	16.80	19.60	23.80	28.00	31.00
	25.00	20.40	23.80	28.90	34.00	37.00
3,000.00	15.00	18.00	21.00	25.50	30.00	39.00
	20.00	21.60	25.20	30.60	36.00	45.00
	25.00	25.20	29.40	35.70	42.00	51.00
5,000.00	25.00	30.00	35.00	42.50	50.00	65.00

Limit of Risk \$5,000.00 P.S. and \$25.00 Weekly Ind.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

STAR INCOME ACCIDENT POLICY
Annual Premium Rates for Selected Male and Female Risks

Weekly Ind.	MALE RISKS				FEMALE RISKS			
	CLASS A Ages 18-64	CLASS B Ages 18-64	CLASS C Ages 18-64	CLASS D* Ages 18-64	CLASS A Ages 18-59	CLASS B Ages 18-59	CLASS C Ages 18-59	CLASS D* Ages 18-59
\$ 5.00	\$ 3.00	\$ 3.60	\$ 4.20	\$ 5.10	\$ 3.60	\$ 4.20	\$ 5.10	\$ 6.00
10.00	6.00	7.20	8.40	10.20	7.20	8.40	10.20	12.00
15.00	9.00	10.80	12.60	15.30	10.80	12.60	15.30	18.00
20.00	12.00	14.40	16.80	20.40	14.40	16.80	20.40	24.00
25.00	15.00	18.00	21.00	25.50	18.00	21.00	25.50	30.00
30.00	18.00	21.60	25.20	30.60	-----	-----	-----	-----
35.00	21.00	25.20	29.40	35.70	-----	-----	-----	-----
40.00	24.00	28.80	33.60	40.80	-----	-----	-----	-----
45.00	27.00	32.40	37.80	45.90	-----	-----	-----	-----
50.00	30.00	36.00	42.00	51.00	-----	-----	-----	-----
60.00	36.00	43.20	50.40	-----	-----	-----	-----	-----
75.00	45.00	54.00	63.00	-----	-----	-----	-----	-----
100.00	60.00	72.00	84.00	-----	-----	-----	-----	-----

Limit of Risk \$100.00 Weekly Indemnity. Limit of Risk \$25.00 Weekly Indemnity. Age 60 or over \$50.00 Weekly Indemnity.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

MAJESTIC ACCIDENT POLICY

Annual Premiums for Selected Male Risks Only

Principal Sum	Weekly Ind.	Medical Reimbursement	CLASS A		CLASS B		CLASS C		CLASS D*	
			Ages 18-59	Ages 60-64	Ages 18-59	Ages 60-64	Ages 18-59	Ages 60-64	Ages 18-54	Ages 55-64
\$1,000.00	\$ 15.00	\$500.00	\$22.30	\$23.70	\$26.90	\$28.80	\$32.80	\$35.20	\$39.50	\$42.00
	20.00	500.00	25.25	26.65	30.65	32.55	37.30	39.70	45.25	47.75
	25.00	500.00	28.20	29.60	34.40	36.30	41.80	44.20	51.00	53.50
	30.00	600.00	32.20	33.60	39.40	41.30	47.80	50.20	58.50	61.00
	40.00	800.00	40.20	41.60	49.40	51.30	59.80	62.20	73.50	76.00
	50.00	1,000.00	48.20	49.60	59.40	61.30	71.80	74.20	88.50	91.00
3,000.00	15.00	500.00	25.70	29.90	30.70	36.40	36.90	44.10	44.00	51.50
	20.00	500.00	28.65	32.85	34.45	40.15	41.40	48.60	49.75	57.25
	25.00	500.00	31.60	35.80	38.20	43.90	45.90	53.10	55.50	63.00
	30.00	600.00	35.60	39.80	43.20	48.90	51.90	59.10	63.00	70.50
	40.00	800.00	43.60	47.80	53.20	58.90	63.90	71.10	78.00	85.50
	50.00	1,000.00	51.60	55.80	63.20	68.90	75.90	83.10	93.00	100.50
5,000.00	25.00	500.00	35.00	42.00	42.00	51.50	50.00	62.00	60.00	72.50
	50.00	1,000.00	55.00	62.00	67.00	76.50	80.00	92.00	97.50	110.00
	75.00	1,500.00	75.00	-----	92.00	-----	110.00	-----	-----	-----
	100.00	2,000.00	95.00	-----	117.00	-----	140.00	-----	-----	-----
10,000.00	50.00	1,000.00	63.50	77.50	76.50	95.50	90.25	114.25	108.75	133.75
	75.00	1,500.00	83.50	-----	101.50	-----	120.25	-----	-----	-----
	100.00	2,000.00	103.50	-----	126.50	-----	150.25	-----	-----	-----
20,000.00	100.00	2,000.00	120.50	-----	145.50	-----	170.75	-----	-----	-----

Limit of risk \$20,000.00 P.S. \$100.00 Weekly Ind. and \$2,000.00 medical reimbursement. Age 60 or over
 \$10,000.00 P.S., \$50.00 W.I. and \$1,000.00 medical reimbursement.

Defendant's Exhibit No. 2—(Continued)

STAR HEALTH POLICY

For Selected Male Risks Only (Age limits—18-55 inclusive)

POLICY PAYS:

For total disability from disease, beginning with the fifteenth day of disability, limit 52 weeks. House confinement not required.

Hospital and/or Graduate Nurses' Fees of 50% of weekly indemnity in addition to other indemnities; limit 20 weeks. Hospital and/or Nurses' Fees payable from first day if totally disabled 15 days or more.

Surgical operation fees according to liberal schedule in Policy. (Payable in addition to other indemnities.)

Annual Cost for each \$5.00 Weekly Indemnity

	Ages	Ages
	18-50	51-55
Class A, B, C, D*	\$6.00	\$9.50
(Limit of Risk \$100.00 Weekly Indemnity.)		

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

STERLING LIFE AND LIMB POLICY

Annual Premium Rates for Selected Male Risks

Principal Sum	Medical Reimbursement	CLASS A		CLASS B		CLASS C		CLASS D*	
		Ages 18-59	Ages 60-64	Ages 18-59	Ages 60-64	Ages 18-59	Ages 60-64	Ages 18-54	Ages 55-64
\$5,000.00	\$ 500.00	\$23.50	\$30.50	\$27.50	\$37.00	\$32.00	\$44.00	\$37.50	\$50.00
	1,000.00	28.50	35.50	33.50	43.00	39.00	51.00	46.00	58.50
	2,000.00	38.50	45.50	45.50	55.00	53.00	65.00	63.00	75.50
10,000.00	1,000.00	42.00	56.00	49.00	68.00	56.75	80.75	66.25	91.25
	2,000.00	52.00	.....	61.00	.....	70.75	.....	83.25	.....
15,000.00	1,500.00	60.50	.....	70.50	.....	81.50	.....	95.00	.....
	2,000.00	65.50	.....	76.50	.....	88.50	.....	103.50	.....
20,000.00	2,000.00	79.00	.....	92.00	.....	106.25	.....	123.75	.....

Limit of risk \$20,000.00 P.S. and \$2,000.00 medical reimbursement. Age 60 or over, \$10,000.00 P.S. and \$1,000.00 medical reimbursement.

Defendant's Exhibit No. 2—(Continued)

STERLING LIFE AND LIMB POLICY

Annual Premium Rates for Selected Female Risks

Principal Sum	Medical Reim- bursement	CLASS A	CLASS B	CLASS C	CLASS D*	
		Ages 18-59	Ages 18-59	Ages 18-59	Ages 18-54	Ages 55-59
\$1,000.00	\$500.00	\$16.00	\$19.00	\$23.00	\$27.75	\$30.25
2,000.00	500.00	17.00	20.00	24.25	29.25	34.25
3,000.00	500.00	18.00	21.00	25.50	30.75	38.25
4,000.00	500.00	19.00	22.00	26.75	32.25	42.25
5,000.00	500.00	20.00	23.00	28.00	33.75	46.25

Limit of risk \$5,000.00 P.S. and \$500.00 medical reimbursement.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

SIMPLEX ACCIDENT POLICY

Rates for Male and Female Ages 18-59 inc.

Class	Principal Sum (Single)	Accident Monthly Indemnity					
		50.00	60.00	75.00	100.00	125.00	150.00
Class	\$1,000.00	\$17.85	\$20.65	\$24.85	\$31.87	\$38.88	\$45.90
D	2,000.00	21.67	24.48	28.68	35.70	42.70	49.72
	3,000.00	.....	28.30	32.50	39.52	46.53	53.55
Class	500.00	18.75	22.05	27.00	.....	.....	.....
E	1,000.00	21.00	24.30	29.25	.....	.....	.....
	2,000.00	25.50	28.80	33.75	.....	.....	.....
Class	500.00	23.43	27.55	33.75	.....	.....	.....
F	1,000.00	26.25	30.37	36.55	.....	.....	.....
	1,500.00	29.05	33.18	39.37	.....	.....	.....
Class	500.00	28.12	33.75	.....	.....	.....	.....
G	750.00	29.79	34.74	.....	.....	.....	.....
	1,000.00	31.50	36.45	.....	.....	.....	.....
Class	500.00	37.50	.....	.....	.....	.....	.....
H							

Business Women charge one classification higher than men in the same occupation.

For Ages 55-64—In addition to the above premiums add the following premiums for each \$1,000.00 Principal Sum. Class D \$3.75, E, F, G, H \$4.50.

For semiannual premium use 51% of annual premium.

For quarterly premium use 26% of annual premium.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

Defendant's Exhibit No. 2—(Continued)

RATES FOR SIMPLEX DISABILITY POLICY

Ages 18 to 50

Class	Principal Sum (Single)	Accident and Sickness Monthly Indemnity					
		50.00	60.00	75.00	100.00	125.00	150.00
Class A	\$1,000.00	\$21.00	\$24.75	\$30.40	\$39.75	\$49.15	58.50
	2,000.00	23.25	27.00	32.65	42.00	51.40	60.75
	3,000.00	.....	29.25	34.90	44.25	53.65	63.00
	5,000.00	.....	.....	.....	48.75	58.15	67.50
Class B	1,000.00	25.20	29.68	36.45	47.70	58.95	70.20
	2,000.00	27.90	32.38	39.15	50.40	61.65	72.90
	3,000.00	.....	35.08	41.85	53.10	64.35	75.60
	5,000.00	.....	.....	.....	58.50	69.75	81.00
Class C	1,000.00	29.40	34.66	42.55	55.65	68.74	81.90
	2,000.00	32.55	37.81	45.70	58.80	71.89	85.05
	3,000.00	.....	40.96	48.85	61.95	75.04	88.20
	4,000.00	.....	.....	.....	65.10	78.19	91.35
	5,000.00	.....	.....	.....	68.25	81.34	94.50
Class D*	1,000.00	35.72	42.05	51.95	67.57	83.50	99.47
	2,000.00	39.55	45.88	55.78	71.40	87.33	103.30
and D	3,000.00	.....	49.71	59.61	75.23	91.16	107.13
Class E	500.00	39.75	47.25	58.74	.....	.....	.....
	1,000.00	42.00	49.50	60.99	.....	.....	.....
	2,000.00	46.50	54.00	65.49	.....	.....	.....
Class F	500.00	49.69	59.09	73.11	.....	.....	.....
	1,000.00	52.51	61.91	75.93	.....	.....	.....
	1,500.00	55.32	64.72	78.74	.....	.....	.....
Class G	500.00	62.02	71.01	.....	.....	.....	.....
	750.00	63.71	72.70	.....	.....	.....	.....
	1,000.00	65.40	74.39	.....	.....	.....	.....
Class H	500.00	64.20	.....	.....	.....	.....	.....

Business women whose occupations take classes A and B, charge class C rate.

Defendant's Exhibit No. 2—(Continued)

All other occupations charge one classification higher than men in the same occupation.

For ages 51 to 59 inclusive premium increases 50%.

For ages 55-59—In addition to the above premiums add the following premiums for each \$1,000.00 Principal Sum. Class D* and D \$3.75, E, F, G, H \$4.50.

For semi-annual premium use 51% of annual premium.

For quarterly premium use 26% of annual premium.

COMMERCIAL CASUALTY INS. CO.

Dec. 4 - 1934

[Endorsed]: Filed August 24, 1945.

[Title of Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 15th day of June, 1945, before the Honorable L. B. Schwel-lenbach, Judge of the above entitled Court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Halverson and June Fowles, and the defendant, Commercial Casualty Insurance Company, a New Jersey Corporation, appearing by its attorneys, Ryan, Askren & Mathewson, and William J. Madden of counsel, and the Court having heard the evidence submitted and the arguments of counsel and being fully advised in the premises, makes the following

FINDINGS OF FACT:

1.

This action was brought under the provisions of the Federal Declaratory Judgment Act, as amended. (Sec. 274 of the Judicial Code; 28 USCA Sec. 400).

2.

Plaintiff is a citizen and resident of the State of Washington.

3.

The defendant is a corporation, organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of, among other things, engaging in a general life, health and accident insurance business, and is duly admitted and licensed to transact such business in the State of Washington.

4.

There is a diversity of citizenship between the plaintiff and the defendant.

5.

That the parties hereto stipulated in Open Court to the waiving of a jury.

6.

That heretofore and on or about the 4th day of May, 1937, in consideration of the payment in advance of a semi-annual [132] premium of \$10.20 by the plaintiff to the defendant herein, said defendant, Commercial Casualty Insurance Company, a New Jersey Corporation, through its officers and agents thereunto duly authorized, duly issued, executed and

delivered to the plaintiff herein, Leslie O. Fowles, its life and accident policy, towit: Star Accident Policy No. 14H, being form Cas. A. & H. No. 5643, which said policy was introduced in evidence in the above entitled case and is marked Plaintiff's Exhibit, and said policy is hereby referred to and by reference made a part hereof as though fully set forth herein. That all premiums due on said policy from the plaintiff to the defendant have been duly and timely paid. That said insurance policy has been at all times herein mentioned in full force and effect.

7.

That said policy of insurance provided, among other things, that defendant insured plaintiff against loss of time resulting from accidental bodily injury, from the date of any accident causing continuous total disability which should prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for such loss of time for the period of such disability. The provision in said policy pertaining to total disability is as follows:

“Schedule II. Total Loss of Time. Or, if such injury shall not result in any of the losses mentioned in Schedule I, but shall within two weeks from the date of accident cause continuous total disability, and prevent the insured from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident indemnity above specified, for the period of such disability.”

8.

That the policy further contained the following provision relative to hospitalization benefits.

“Schedule VIII. If the injury to the insured shall entitle him to weekly indemnity under the terms of this policy and within ninety days from the commencement of disability shall necessitate treatment and residence in a hospital, the Company will pay, in addition to the indemnity otherwise provided for a period of not exceeding fifteen consecutive weeks, during which time the Insured shall be necessarily confined in the hospital, the amount [133] insurance except as it may be modified by the Company’s classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

“If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall

mean only as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable."

The defendant asserted that under the above provisions said policy was limited because of the change of occupation to one more hazardous and that the benefits should be reduced thereby. Defendant alleged that plaintiff changed his occupation from that of mail carrier (city on foot) classified as "Class B," to that of officer in the United States Army, classified as "Class K," and that because of such change of occupation the defendant was obliged to pay to the plaintiff a sum not in excess of \$5.00 per week while the plaintiff was confined to the Hahne-mann Hospital together with a sum not in excess of 5.00 per week during the period when the plaintiff was totally disabled, up to the time of trial.

The plaintiff denied that he had changed his occupation and alleged that his military service was temporary and that he expected to return to the postal service when he was released from the Army.

14.

That the defendant filed the Star Accident Policy with the State Commissioner of Insurance of the State of Washington on....., and properly filed its classification of risks and premium rates pertaining to the said [134] for hos-

pital expense but not exceeding per week the amount payable hereunder as single weekly indemnity.”

9.

That at the time of making application for said policy of insurance, plaintiff's occupation was that of mail carrier in the postal service of the United States in the City of Olympia, Washington, that at the said time, plaintiff was, and had been for a number of years, a member of the Washington National Guard; that the Washington National Guard was mobilized in 1941, and later made a part of the army of the United States.

10.

That on or about the 14th day of April, 1943, at or about the hour of 7:30 o'clock A. M. plaintiff, while operating a motor vehicle in Philadelphia, Pennsylvania, solely for recreation and not pertaining to any occupation, nor in the performance of any occupational duties, was injured in an accidental collision between said motor vehicle and a trolley car.

11.

Plaintiff duly notified defendant of said accident and of the fact that he was disabled and confined to a hospital and under medical care.

12.

It was stipulated by and between the plaintiff and the defendant at the time of the trial, that due to plaintiff's injury in said accident, that the plaintiff had been continuously and totally disabled from

April 14, 1943, the date of the accident, to June 15, 1945, the date of the trial. The court further finds that the plaintiff was confined for four and one-half weeks in the Hahnemann Hospital, a civilian hospital in Philadelphia, Pennsylvania.

13.

Section I of the "Standard Provisions" of said policy of insurance reads as follows:

"This policy includes the endorsements and attached papers, if any, and contains the entire contract of [135] policy with the Commissioner of Insurance of the State of Washington.

15.

That the defendant has tendered to the plaintiff the amount which it alleges is due under the terms of the policy but that such tender has been refused. That there is due and owing under said policy the sum of \$25.00 per week, commencing with the 21st day of April, 1943, and 25.00 for each week thereafter, up to June 15, 1945, together with interest. That there is due the sum of \$25.00 per week for the four and one-half weeks that the plaintiff was in the Hahnemann Hospital.

From the foregoing Findings of Fact, the court makes the following

CONCLUSION OF LAW

1.

That the defendant is indebted to and required to pay to the plaintiff the sum of \$25.00 per week from April 21, 1943, to June 15, 1945.

2.

That the defendant is indebted and required to pay to the plaintiff the sum of \$25.00 per week for the four and one-half weeks the plaintiff was in the Hahnemann Hospital.

Done in Open Court this.....day of June, 1945.

.....,

United States Judge.

Presented & Refused—June 22, 1945.

L. B. SCHWELLENBACH,
Judge.

Copy received 6/22/45.

JUNE FOWLES,
C. W. HALVERSON,
Atty. for Pltf.

[Endorsed]: Filed Jun. 22, 1945. [136]

[Title of Court and Cause.]

PROPOSED JUDGMENT

This cause coming on regularly for trial, June 15, 1945, before the Honorable L. B. Schwellenbach, Judge of the above entitled Court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Halverson and June Fowles, and the defendant, the Commercial

Casualty Insurance Company, a New Jersey Corporation, appearing by its Attorneys, Ryan, Askren & Mathewson, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendant in the sum of \$25.00 per week for each week commencing April 21, 1943, to June 15, 1945.

It Is Further Ordered, Adjudged and Decreed that the plaintiff have judgment against the defendant in the sum of \$112.50 for hospital expenses while confined in Hahnemann Hospital, Philadelphia, Pennsylvania.

Done in Open Court this.....day of June, 1945.

.....

Presented by

RYAN, ASKREN &
MATHEWSON,

Copy received 6/22/45.

JUNE FOWLES,
C. W. HALVERSON.

Refused June 22, 1945.

L. B. SCHWELLENBACH,
United States Judge.

[Endorsed]: Filed Jun. 22, 1945. [137]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This Cause came on regularly for trial on the 15th day of June, 1945, before Honorable L. B. Schwellenbach, Judge of the above-entitled Court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Halverson and June Fowles, and the defendant, Commercial Casualty Insurance Company, a New Jersey Corporation, appearing by its attorneys, Ryan, Askren & Mathewson, and William J. Madden of counsel, and the Court having heard the evidence submitted and the arguments of counsel and being fully advised in the premises, makes the following

FINDINGS OF FACT:

1.

This action was brought under the provisions of the Federal Declaratory Judgment Act, as amended. (Sec. 274 of the Judicial Code; 28 USCA Sec. 400.)

2.

Plaintiff is a citizen and resident of the State of Washington.

3.

The defendant is a corporation, organized and existing under and by virtue of the laws of the State of New Jersey for the purpose of, among other things, engaging in a general [138] life, health and accident insurance business, and is duly admitted and

licensed to transact such business in the State of Washington.

4.

There is a diversity of citizenship between the plaintiff and the defendant. The value of the plaintiff's rights in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs, as will more fully hereinafter appear.

5.

That the parties hereto stipulated in Open Court to the waiving of a jury.

6.

That heretofore and on or about the 4th day of May, 1937, in consideration of the payment in advance of a semi-annual premium of \$10.20 by the plaintiff to the defendant herein, said defendant, Commercial Casualty Insurance Company, a New Jersey Corporation, through its officers and agents thereunto duly authorized, duly issued, executed and delivered to the plaintiff herein, Leslie O. Fowles, its life and accident policy, towit: Star Accident Policy No. 14H, being form Cas. A. & H. No. 5643, which said policy was introduced in evidence in the above entitled case and is marked Plaintiff's Exhibit A, and said policy is hereby referred to and by reference made a part hereof as though fully set forth herein. That all premiums due on said policy from the plaintiff to the defendant have been duly and timely paid. That said insurance policy has been at all times herein mentioned in full force and effect.

7.

That said policy of insurance provided, among other things, that defendant insured plaintiff against loss of time resulting from accidental bodily injury, from the date of any accident causing continuous total disability which should [139] prevent plaintiff from performing any and every duty pertaining to his occupation, to the extent of \$25.00 per week for such loss of time for the period of such disability. The provision in said policy pertaining to total disability is as follows:

“Schedule II. Total Loss of Time. Or, if such injury shall not result in any of the losses mentioned in Schedule I, but shall within two weeks from the date of accident cause continuous total disability, and prevent the insured from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident indemnity above specified, for the period of such disability.”

8.

That said policy of insurance provided further that if such injury entitled plaintiff to such weekly indemnity under the terms thereof, and within ninety days from the commencement of such disability necessitated treatment and residence in a hospital, defendant would pay for such treatment and residence in a hospital, in addition to the indemnity otherwise provided, for a period not exceeding fifteen consecutive weeks, the amount of hospital expense to the extent of \$25.00 weekly. The hospitalization indemnity provision is as follows:

“Schedule VIII. If such injury to the insured shall entitle him to weekly indemnity under the terms of this policy and within ninety days from the commencement of disability shall necessitate treatment and residence in a hospital, the Company will pay, in addition to the indemnity otherwise provided for a period of not exceeding fifteen consecutive weeks, during which time the Insured shall be necessarily confined in the hospital, the amount for hospital expense but not exceeding per week the amount payable hereunder as single weekly indemnity.”

9.

That at the time of making application for said policy of insurance, plaintiff's occupation was that of mail carrier in the postal service of the United States in the City of Olympia, Washington; that at the time, plaintiff was, and [140] had been for a number of years, a member of the Washington National Guard; that the Washington National Guard was mobilized in 1941, and later made a part of the army of the United States, all of which facts were known to defendant's agent, Bader.

10.

That on or about the 14th day of April, 1943, at or about the hour of 7:10 o'clock A. M., plaintiff, while operating a motor vehicle in Philadelphia, Pennsylvania, solely for recreation and not pertaining to any occupation, nor in the performance of any occupational duties, was injured in an acciden-

tal collision between said motor vehicle and a trolley car.

11.

Plaintiff duly notified defendant of said accident, of the fact that he was disabled and confined to a hospital and under medical care.

12.

It was stipulated by and between the plaintiff and defendant at the time of trial, that due to plaintiff's injuries in said accident, that plaintiff has been continuously and totally disabled from the date of the accident, April 14, 1943, to the present time; that said stipulation was entered into with the understanding that it was not to limit and restrict plaintiff's total disability to the period of time between the date of said accident and the present time, and said stipulation does not limit in any way the period of such total disability as to the future. That plaintiff has been prevented by the injuries incurred in said accident from performing any duties of his occupation or any occupation since the date of said accident, that as a result of said accident and the injuries resulting therefrom, plaintiff has been confined in hospitals for a period of approximately eighteen months, four and one-half weeks of which time plaintiff was hospitalized in the Hahnemann Hospital, a civilian hospital in Philadelphia, Pennsylvania.

13.

That at the time of said accident, April 14, 1943, [141] plaintiff had a life expectancy of 29.62 years,

and the benefits accrued and to accrue in the future, to plaintiff from defendant, will exceed the sum of \$3,000.00 exclusive of interests and costs.

14.

That an actual controversy and dispute existed between the plaintiff and defendant as to the meaning and construction of said policy of insurance and the value of plaintiff's rights were affected thereby.

Section I of the "Standard Provisions" of said policy of insurance reads as follows:

"This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

"If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and

classification of risks mentioned in this policy shall mean only as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable."

Defendant asserted that under the above provision said policy was limited by a change of occupation to one more hazardous and the benefits would be reduced to a portion of the indemnities specified in the policy, and alleged that the [142] plaintiff changed his occupation from that of mail carrier (city on foot—Class B) to that of officer in the United States Army, classified as "class K," and that because of such change of occupation defendant was only obligated to pay to the plaintiff on account of said accidental injuries, a sum not in excess of \$5.00 per week while the plaintiff was confined to Hahnemann Hospital together with sum not in excess of \$5.00 per week during the period which plaintiff was totally disabled from the injury up to the limit specified in the policy.

The plaintiff denied that he had changed his occupation, asserting that he was on temporary leave from the post office department during military service in the army of the United States, that he intended to return to his employment in the Olympia post office, and that during nearly eighteen years employment in the post office he had contrib-

uted a percentage of his salary each month toward the purchase of a retirement annuity, and that he did not withdraw the funds paid toward the purchase of such annuity when he obtained leave of absence from the post office at the time the Washington National Guard was mobilized. Plaintiff also maintained that he was doing no act nor thing pertaining to any occupation at the time of his accident but was engaged in recreation during a furlough.

15.

That defendant filed form Cas. A. & H. 5643 of Star Accident Policy No. 14H with the State Commissioner of Insurance of the State of Washington on June 3, 1931 but failed to file its classification of risks pertaining to said policy with said commissioner of insurance at the time of filing said form or at any time as provided by the statutes and the Law of the State of Washington. The law and statutes of the State of [143] Washington provide that in the event such filing is not made that the policy shall be fully enforceable according to its terms and conditions.

16.

At no time has defendant paid or tendered to the plaintiff any sum or sums whatsoever due to the plaintiff under said policy, although said plaintiff was and now is continuously and totally disabled from the date of said accident due to injuries received therein, and unable to perform any work for compensation or profit. That there is due and owing and unpaid from the defendant to the plaintiff the

sum of Twenty-five (\$25.00) dollars per week commencing on the 21st day of April, 1943, and Twenty-five (\$25.00) dollars for each week thereafter until the date hereof, together with interest thereon at the rate of six per cent (6%) per annum from the due date of each weekly payment of \$25.00 until paid; and there is due, owing and unpaid from the defendant to the plaintiff for hospital expenses the sum of \$25.00 per week from April 14, 1943, to May 15, 1943, together with interest thereon at the rate of 6% per annum from May 15, 1943, until the date hereof.

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

That plaintiff is entitled to judgment declaring plaintiff's rights under Star Accident Policy No. 14H, form Cas A. & H. 5643, issued by the defendant, the Commercial Casualty Insurance Company, a New Jersey Corporation, to the plaintiff herein, and that plaintiff is entitled to judgment against defendant as follows:

1.

That no classification of risks pertaining to said [144] policy has been filed by the defendant with the State Insurance Commissioner of the State of Washington as provided by the law and statutes of the State of Washington, which would in any way limit or reduce the indemnity provided in said policy, and said policy is declared to be in full force and effect in all respects.

2.

That defendant is indebted and required to pay to the plaintiff the amount of \$25.00 per week as weekly indemnity from April 21, 1943, for the period of total disability of the plaintiff, together with interest at the rate of 6% per annum from the due date of each installment of weekly indemnity until paid.

3.

That defendant is indebted and required to pay to the plaintiff the amount of \$112.50 as hospitalization indemnity for the four and one-half weeks in Hahnemann Hospital, together with interest thereon at the rate of 6% from May 15, 1943, until paid.

4.

That plaintiff recover costs and disbursements herein expended and incurred.

Done in Open Court this 22 day of June, 1945.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

JUNE FOWLES

C. W. HALVERSON

Attorneys for Plaintiff

[Endorsed]: Filed June 22, 1945. [145]

In the United States District Court In and For the
Eastern District of Washington, Southern
Division

Civil No. 191

LESLIE O. FOWLES,

Plaintiff,

vs.

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey Corporation,
Defendant.

JUDGMENT

This Cause coming on regularly for trial, June 15, 1945, before the Honorable L. B. Schwellenbach, Judge of the above entitled court, sitting without a jury; the plaintiff, Leslie O. Fowles, appearing in person and by his attorneys, C. W. Halverson and June Fowles, and the defendant, the Commercial Casualty Insurance Company, a New Jersey corporation, appearing by its attorneys, Ryan, Askren & Mathewson, and William J. Madden of counsel, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises,

It is hereby Ordered, Adjudged, Declared and Decreed, that the plaintiff's rights under Star Accident Policy No. 14H, form Cas. A. & H. 5643, issued by defendant company to plaintiff are not limited nor restricted; that no classification of risks pertaining to said policy has been filed by the defendant with the State Insurance Commissioner of

the State of Washington as provided by the law and statutes of the State of Washington, which would in any way limit or reduce the indemnity provided in said policy, and the plaintiff is entitled to full benefits thereunder as set forth therein, and said policy is [146] declared to be in full force and effect in all respects.

It is hereby Ordered, Adjudged, Declared and Decreed, that defendant is required to pay to the plaintiff the amount of \$25.00 per week as weekly indemnity from April 21, 1943, for the period of total disability of the plaintiff.

It is further Ordered, Adjudged, Declared and Decreed, that the plaintiff have and recover judgment against the defendant, the Commercial Casualty Insurance Company, a New Jersey Corporation in the sum of \$25.00 per week for each week commencing April 21, 1943, to June 15, 1945, together with interest on each of said weekly indemnity payments of \$25.00 from the due date thereof until paid.

It is further Ordered, Adjudged, Declared and Decreed that defendant is indebted and required to pay to the plaintiff the amount of \$112.50 as hospitalization indemnity for the four and one-half weeks in Hahnemann Hospital, and that plaintiff have and recover judgment against the defendant for said hospitalization indemnity in the amount of \$112.50 while confined in Hahnemann Hospital, Philadelphia, Pennsylvania, a civilian hospital, together with interest thereon from the due date until paid.

It is further Ordered, Adjudged, Declared and Decreed that plaintiff recover costs and disbursements herein expended and incurred.

Done in Open Court this 22 day of June, 1945.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

JUNE FOWLES

C. W. HALVERSON

Attorneys for Plaintiff.

[Endorsed]: Filed June 22, 1945. [147]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant by its attorneys, Ryan, Askren & Mathewson, and respectfully petitions the Court to grant a new trial on the following grounds:

1. Irregularity in the proceedings of the Court and abuse of discretion by which the defendant was prevented from having a fair trial.

2. Accident or surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence material to the defendant which it could not with reasonable diligence have discovered and produced at the trial.

4. Insufficiency of evidence to justify the decision, in that there was no competent evidence produced at the trial indicating that the classification of hazards and premium rates had not been prop-

erly filed with the Commissioner of Insurance of the State of Washington.

5. Error in law occurring at the trial in that the court decided the litigation on the authority of the case of [148] *Nordin vs. Commercial Casualty Company*, which case was not first served upon counsel, in violation of Rule 9B of the Rules of the District Court of the United States, Eastern District of Washington, and error in excluding testimony that the defendant had properly complied with the requirements of the statutes of the State of Washington and the State Commissioner of Insurance relative to filing of classification of risks and premium rates.

6. Error in the holding of the court that the defendant had not properly filed its classification of risks because this classification was not physically attached to the schedule of premium rates filed with the Star Accident Policy.

Respectfully submitted,

RYAN, ASKREN, MATHEWSON

Attorneys for Defendant,

Commercial Casualty Co.

Copy received and service accepted this 22nd June, 1945, of the foregoing motion for new trial.

JUNE FOWLES

C. W. HALVERSON

Attys. for Pltf.

[Endorsed]: Filed June 22, 1945. [149]

[Title of Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter came on duly and regularly for hearing before the Hon. L. B. Schwellenbach, this 22nd day of June, 1945, on the motion of the defendant for a new trial, the plaintiff appearing by his attorneys, June Fowles and C. W. Halverson, and the defendant appearing by its attorneys, Ryan, Askren and Mathewson and William J. Madden, of counsel, and it appearing to the court that findings of fact and conclusions of law and judgment in the above entitled cause have previously been signed and entered, and the court having previously ordered arguments upon said motion, and there being no objection, now therefore,

It is Hereby Ordered that said defendant's motion for a new trial be and the same is hereby denied, to all of which the defendant excepts, and its exception is hereby allowed.

Done in open court this 22nd day of June, 1945.

L. B. SCHWELLENBACH

Judge.

Presented by:

JUNE FOWLES

C. W. HALVERSON

O. K. as to form:

WILLIAM J. MADDEN

of Counsel for deft.

[Endorsed]: Filed June 22, 1945. [150]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Commercial Casualty Insurance Company, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 22nd of June, 1945.

RYAN, ASKREN, MATHEWSON
Attorneys for Appellant, Commercial Casualty Insurance Company

Copy of this notice mailed to C. W. Halverson and June Fowles, Attorneys for Plaintiff, July 26, 1945.

A. A. LaFRAMBOISE,
Clerk

[Endorsed]: Filed July 25, 1945. [151]

[Title of Court and Cause.]

COST AND SUPERSEDEAS BOND

Know All Men by These Presents:

That we, Commercial Casualty Insurance Company, as principal and The Metropolitan Casualty Insurance Company of New York, as sureties, are held and firmly bound unto Leslie O. Fowles in the full and just sum of \$4,200.00 to be paid to the said

Leslie O. Fowles his attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23 day of July in the year of our Lord One Thousand Nine Hundred and Forty-five.

Whereas, lately at a District Court of the United States for the Eastern District of Washington, Southern Division, in a suit *depending* in said Court, between Leslie O. Fowles, Plaintiff, and Commercial Casualty Insurance Company, Defendant, a judgment was rendered against the said Defendant and the said Defendant having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid suit, being an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Commercial Casualty Insurance Company shall prosecute its appeals to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it fail to make its plea good, then the above obli-

gation to be void; else to remain in full force and virtue.

COMMERCIAL CASUALTY
INSURANCE COMPANY,
a New Jersey Corporation

[Seal] By ARMAND KELLER
Attorney-in-fact. [152]

THE METROPOLITAN CASU-
ALTY INSURANCE COM-
PANY of New York

[Seal] By KEITH D. FISK
Attorney-in-fact.

Approved this 30th day of July, 1945.

LLOYD L. BLACK
United States District Judge.

[Endorsed]: Filed July 30, 1945. [153]

[Title of Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD OF APPEAL

To the Clerk of the United States District Court:

Comes now the appellant, by its attorneys, Ryan, Askren & Mathewson, and designates the following pleadings which it wishes prepared for transmission to the Circuit Court of Appeals in connection with Appeal heretofore filed in this cause:

1. Plaintiff's Original Complaint

2. Motion and Affidavit to Quash Summons and Service thereof.
3. Plaintiff's Amended Complaint.
4. Motion to Quash Amended Complaint and service thereof.
5. Opinion of Court on Defendant's Motion to Quash Amended Complaint.
6. Order Denying Defendant's Motion to Dismiss and Quash.
7. Defendant's Answer.
8. Plaintiff's Reply.
9. Reporter's Transcript of Evidence.
10. Defendant's Proposed Findings of Fact, Conclusions of Law, and Judgment.
11. Court's Memorandum Opinion.
12. Findings of Fact and Conclusions of Law.
13. Defendant's Motion for New Trial.
14. Order Denying Motion for New Trial.
15. Judgment.
16. Notice of Appeal.

Respectfully submitted,

RYAN, ASKREN, MATHEWSON
Attorneys for Appellant

Service accepted and copy received of Appellant's Designation of Contents of Record on Appeal.

Dated August 18, 1945.

C. W. HALVERSON
Attorney for Respondent

[Endorsed]: Filed Aug. 20, 1945. [154]

[Title of Court and Cause.]

APPELLANT'S AMENDED DESIGNATION
OF CONTENTS OF RECORD OF APPEAL

To the Clerk of the United States District Court:

Comes now the appellant, by its attorneys, Ryan, Askren & Mathewson, and designates the following additional exhibits which it wishes prepared for transmission to the Circuit Court of Appeals in connection with Appeal heretofore filed in this cause:

1. Plaintiff's exhibit D, the 1929 Manual of Risks.
2. Defendant's Exhibit 1, the 1932 Manual of Risks.
3. Defendant's Exhibit 2, documents contained in envelope.
4. This notice and the appellant's original designation of record for appeal.

Respectfully submitted,

RYAN, ASKREN, MATHEWSON

Attorneys for Appellant

Copy received 8/23/45.

C. W. HALVERSON

Atty. for Pltf.

[Endorsed]: Filed Aug. 24, 1945. [155]

[Title of Court and Cause.]

ORDER

On the oral application of William J. Madden, of attorneys for the Defendants for an order directing the Clerk to transmit Plaintiff's Exhibit "D" with

the record on appeal in said cause and for an extension of ten days in which to prepare and transmit the record on appeal, and June Fowles appearing as attorney for the plaintiff and making no objection to said application,

It Is Hereby Ordered that said application be and the same is hereby granted and the Clerk of this Court is hereby directed to transmit to the United States Circuit Court of Appeals the original exhibit Plaintiff's Exhibit "D" and

It Is Further Ordered that the time to prepare and transmit the record on appeal to the United States Circuit Court of Appeals be and it is hereby extended for the period of ten (10) days.

Done in open Court this 30th day of August, 1945.

CHARLES H. LEAVY

United States District Judge

Approved:

JUNE FOWLES

Attorney for Plaintiff-

Appellee

[Endorsed]: Filed Aug. 30, 1945. [156]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Wash-

ington, do hereby certify that the foregoing type-written pages and printed pamphlet (numbered one to 157, inclusive) are full, true and correct copies of the record and files in the above entitled cause necessary to the hearing of the appeal thereof in the United States Circuit Court for the Ninth Circuit, at San Francisco, pursuant to the Notice of Appeal filed in said cause by the appellant, and as called for by the Praecipe for Transcript of Record on Appeal, filed by appellant on July 25, 1945, as the same remain on file and of record in the office of the clerk of said court, and that the same, together with the original of Plaintiff's Exhibit "D," constitute the record on said appeal.

I further certify that pursuant to order of the District Court I am transmitting herewith the Original Plaintiff's Exhibit "D."

I further certify that the fees of the clerk of the above entitled court for preparing and certifying said record on appeal amount to the sum of \$36.70, and that said sum has been paid in full to me by Ryan, Askren & Mathewson, counsel for appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the Eastern District of Washington, at Spokane, in said District, this 10th day of September, 1945.

[Seal]

A. A. LaFRAMBOISE

Clerk [157]

[Endorsed]: No. 11139. United States Circuit Court of Appeals for the Ninth Circuit. Commercial Casualty Insurance Company, a New Jersey Corporation, Appellant, vs. Leslie O. Fowles, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 13, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11139

COMMERCIAL CASUALTY INSURANCE
COMPANY, a New Jersey corporation,
Appellant,

vs.

LESLIE O. FOWLES,

Appellee.

STATEMENT OF POINTS

1. United States District Court did not have jurisdiction of the case or subject matter inasmuch as the jurisdictional amount of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs, was not involved. Title 28, Section 41, U.S.C.A., sets forth the required jurisdictional amount neces-

sary for suits in the District Court, and the plaintiff's complaint, as well as the evidence, indicates that this amount was not involved in the case at bar.

2. The plaintiff's original complaint on its face indicated that the amount involved was less than Three Thousand Dollars (\$3,000.00), and the Court was in error in not holding that the plaintiff was bound by the said allegations therein contained, and was in error in not dismissing the action.

3. The lower Court was in error in calculating speculative future damages of the plaintiff, and, using such speculative damages as a basis, erred in making a finding that the amount in controversy exceeded the jurisdictional minimum.

4. There was no evidence introduced at the trial relating to the life expectancy of the plaintiff, and the lower Court was in error in making a finding of fact that the plaintiff had a life expectancy of 29.62 years.

5. The lower Court was in error in granting speculative future damages which had not accrued at the time of the trial and which were not certain to accrue in the future.

6. That there was a question as to the amount due to the plaintiff in view of his alleged change of occupation, but there was no question involved calling for an interpretation of the policy or its terms, and the lower Court was in error in holding as a fact that there was a dispute as to the meaning and construction of the policy.

7. That the requirements of Rem. Rev. Stat., Section 7233, have been complied with by the de-

fendant company, and that the District Court was in error in deciding the case in favor of the plaintiff, on the ground that the defendant had failed to file a proper classification of risks.

WILLIAM J. MADDEN

Of Ryan, Askren & Mathewson, Attorneys for
Appellant

Service accepted and copy received this 28th day
of August, 1945.

C. W. HALVERSON

Attorney for Appellee

[Endorsed]: Filed September 1, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant herewith designates the whole record and all of the evidence as necessary for the consideration of the Statement of Points heretofore filed in this cause.

RYAN, ASKREN, MATHEWSON

Of Ryan, Askren & Mathewson, Attorneys for
Appellant

Copy served on C. W. Halverson, attorney for
appellee, Aug. 27, 1945.

W. J. MADDEN

of Counsel for Appellant

[Endorsed]: Filed September 4, 1945. Paul P.
O'Brien, Clerk.

